a hearing which shall be transcribed. The Commission's determination concerning the scope of the product category into which to classify the short life cycle merchandise identified by the petition shall be issued no later than ninety (90) days after the filing of the petition.

(b) The Commission may on its own initiative and at any time modify the scope of a product category established in a proceeding pursuant to paragraph (a) of this section. Ninety (90) days prior to such modification, the Commission shall publish a notice of proposed modification in the **Federal Register.** Upon request of an interested party filed within proposed modification in the **Federal Register.** Upon request of an interested party filed within fifteen (15) days after publication of the notice of proposed modification, the Commission will conduct a hearing which shall be transcribed. Written submissions concerning the proposed modification will be accepted if filed no later than sixty (60) days after publication of the notice of proposed modification.

By order of the Commission

Issued: August 24, 1988.

Kenneth R. Mason,

Secretary.

[FR Doc. 88-19637 Filed 8-26-88; 8:45 am]

BILLING CODE 7020-02-M

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19 CFR Parts 210 and 211

Interim Rules Governing Investigations and Enforcement Procedures Pertaining to Unfair Practices in Import Trade

AGENCY: U.S. International Trade Commission.

ACTION: Interim rules and request for comments.

SUMMARY: The Commission has revised 19 CFR Parts 210 and 211 on an interim basis to implement certain provisions of the Omnibus Trade and Competitiveness Act of 1988, which became effective on August 23, 1988.

DATES: The effective date of the interim rules is August 23, 1988. Comments on the interim rules will be considered if received on or before October 28, 1988.

ADDRESSES: A signed original and fourteen (14) copies of each set of comments, along with a cover letter addressed to Kenneth R. Mason, Secretary, should be sent to the U.S. International Trade Commission, Office of the Secretary, 500 E Street, SW., Room 112, Washington, DC 20436.

FOR FURTHER INFORMATION CONTACT: P.N. Smithey, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-252-1061. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810.

SUPPLEMENTARY INFORMATION:

The Omnibus Trade and Competitiveness Act of 1988

On August 23, 1988, the Omnibus Trade and Competitiveness Act of 1988 ("the Omnibus Trade Act") became effective. This new legislation contains provisions that, inter alia, amend section 337 of the Tariff Act of 1930 ("the Tariff Act") (19 U.S.C. 1337) and repeal 19 U.S.C. 1337a.[1] As a result, the new legislation has affected the Commission's practice and procedure under section 337 as summarized below:

(1) The elements of a section 337 violation have changed. The definition of a domestic industry has been broadened for cases based on the alleged infringement of a valid and enforceable U.S. patent or a federally registered copyright, trademark, or mask work, and for cases based on the importation or sale of a product allegedly made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent. In addition, complainants are no longer required to prove, in any type of case, that the relevant domestic industry is efficiently and economically operated. Complainants also do not have to prove injury in cases based on the alleged infringement of a valid and enforceable U.S. patent or a federally registered copyright, trademark, or mask work, or in cases based on the importation or sale of a product allegedly made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent.

(2) The law limits access to confidential business information that is exchanged among parties or submitted to the Commission in connection with a section 337 investigation to the following persons: (a) Those who are granted access under a protective order; (b) officers or employees of the Commission who are directly involved in carrying out the investigation; (c) officers or employees of the U.S. Government who are involved in the Presidential review of section 337 remedial orders pursuant to subsection (h) of section 337; and (d) officers or employees of the U.S. Customs Service who are directly involved in administering an exclusion order resulting from the investigation in connection with which the confidential business information was submitted. Disclosure of confidential business information to other persons without the consent of the submitter is prohibited by law.

(3) The Commission now has very short statutory deadlines for determining whether to grant or deny temporary relief—*viz.*, 90 days after institution in an ordinary investigation and up to 150 days in a "more complicated" investigation. Complainants can be required to post a bond as a prerequisite to obtaining such relief, and if the Commission ultimately determines that respondents have not violated section 337, the bond may be forfeited to the U.S. Treasury in in accordance with rules prescribed by the Commission.[2]

(4) The Commission's express jurisdiction under section 337 has been expanded to include actions that the Commission previously took pursuant to inherent authority under section 337 or authority derived from the Administrative Procedure Act ("the APA")—*i.e.*, (a) termination of investigations in whole or in part on the basis of settlement agreements or consent orders with no finding as to whether section 337 has been violated; (b) the issuance of affirmative final determinations and remedial orders (general or limited exclusion orders or cease and desist orders) in default cases; and (c) modification or rescission of remedial orders in response to a

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[1] *See* sections 1341(b) and 1342 of the Omnibus Trade Act. The bill that became the Omnibus Trade Act is H.R. 4848, 100th Cong. 2d Sess. (1988). The provisions of H.R. 4848 that amend section 337 of the Tariff Act and repeal 19 U.S.C. 1337a are identical to provisions of H.R. 3, 100th Cong., 2d Sess (1988), a previous trade bill which the President vetoed. For that reason, the legislative history of H.R. 3 also serves as the legislative history of the relevant provisions of H.R. 4848. *See* section 2 of the Omnibus Trade Act. (*See also* the citations in nn. 2, 9, 11, 12, 14, 15, 21, and 29 of this notice.)

[2] Section 337(e)(2) of the Tariff Act, created by section 1342(a)(3)(B) of the Omnibus Trade Act; H.R. Rep. No. 576, 100th Cong., 2nd Sess. 635-636 (1988). The Commission is not required to apply the new statutory provisions relating to the posting of temporary relief bonds by complainants until the earlier of the 90th day after enactment of the Omnibus Trade Act or the day on which the Commission issues interim regulations setting forth procedures relating to the posting of such bonds. Section 1342(d)(1)(B) of the Omnibus Trade Act; H.R. Rep. No. 576 at 635. Interim Commission rules governing the posting of temporary relief bonds and the possible forfeiture of such bonds will be published at a later date.

motion by a respondent previously found to be in violation of section 337.

(5) The relief and penalty provisions of section 337 have been strengthened. The Commission now has express authorization to issue cease and desist orders in addition to (as well as in lieu of) exclusion orders. Articles imported in violation of an outstanding exclusion order can be seized and forfeited by order of the Commission. The maximum daily statutory civil penalty for violation of a cease and desist order has been increased to $100,000 or twice the domestic value of the articles on each day they are entered or sold in violation of the order.

(6) The Commission is now authorized to impose sanctions for abuse of discovery and abuse of process in section 337 investigations to the extent provided by Rules 11 and 37 of the Federal Rules of Civil Procedure.

(7) The statutory provision exempting U.S. Government importations from section 337 remedial orders in patent-based investigations has been expanded to cover remedial orders in investigations based on infringement of a federally registered copyright or mask work.

(8) Any investigation due to be completed within 180 days after the enactment of the new legislation can be declared "complicated" and its 12-month or 18-month statutory deadline can be extended by as much as 3 months.

The Commission has determined to apply the amendments to section 337 contained in the new legislation to all pending section 337 investigations. To the extent such amendments affect the scope of a pending investigation, the Commission expects that a motion will be made to amend the scope and notice of that investigation pursuant to interim rule 210.22.

The Adoption of Interim Rules To Implement the Omnibus Trade and Competitiveness Act of 1988

As indicated above, the Omnibus Trade Act affects section 337 practice and procedure in many respects. Commission rules to implement new legislation ordinarily are promulgated in accordance with the rulemaking provisions of section 553 of the APA, which entails the following steps: (1) Publication of a notice of proposed rulemaking; (2) solicitation of public comment on the proposed rules; (3) Commission review of such comments prior to developing final rules; and (4) publication of the final rules 30 days prior to their effective date. *See* 5 U.S.C. 553. That procedure could not be utilized in this instance because the new legislation became effective upon enactment, and it was not possible to complete the procedure prior to the effective date of the new legislation.

The Commission thus determined to adopt interim rules that would go into effect upon enactment of the new legislation and would remain in effect until the Commission is able to adopt final rules promulgated in accordance with the usual notice, comment, and advance publication procedure.[3]

The Commission's authority to adopt interim rules without following all steps listed in section 553 of the APA is derived from two sources: (1) Section 335 of the Tariff Act (19 U.S.C. 1335) and (2) provisions of section 553 of the APA, which allow an agency to dispense with various steps in the prescribed rulemaking procedure under certain circumstances.

Section 335 of the Tariff Act authorizes the Commission "to adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties." 19 U.S.C. 1335. The Commission determined that the need for interim rules was clear in this instance. The Commission noted that the new legislation alters section 337 practice and procedure in many respects and that some Commission rules had to be revised so that they would not conflict with the new legislation or the congressional intent expressed in its legislative history. The Commission also found that other rules had to be revised in order (1) to conform to the language or provisions of the new legislation, (2) to bring the rule into technical conformity with the new legislation (*e.g.*, by inserting correct citations to redesignated subsections of the amended statute), or (3) to avoid confusion about how unrevised provisions of a rule would be applied in light of the new legislation. The Commission also found that it had to promulgate new rules to cover matters that are provided for in the new legislation but not covered by an existing rule. In sum, the Commission found that rulemaking was essential for the orderly administration of section 337 as amended by the new legislation.

Furthermore, since the legislation was to become effective immediately upon enactment, the Commission concluded that it was imperative that implementing interim Commission rules be in place as close as possible to the enactment date of the new statute.

The Commission noted that an agency may dispense with publication of a notice of proposed rulemaking when the following circumstances exist: (1) The proposed rules are interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice; or (2) the agency for good cause finds that notice and the procedure for public comment are impracticable, unnecessary, or contrary to the public interest, and that finding and the reasons therefor are incorporated into the rules adopted by the agency. *See* 5 U.S.C. 553(b). An agency may also dispense with the publication of a notice of final rules 30 days prior to their effective date if (1) the rules are interpretive rules or statements of policy or (2) the agency finds that "good cause" exists for not meeting the advance publication requirement and that finding is published along with the rule. *See* 5 U.S.C. 553(d)(3).

In this instance, the Commission determined that the requisite circumstances existed for dispensing with the notice, comment, and advance publication that ordinarily precede the adoption of Commission rules. For purposes of invoking the section 553(b) exemption from publishing a notice of proposed rulemaking (which would have solicited public comment), the Commission noted that (1) the interim rules it intended to adopt are "agency rules of procedure or practice"; and (2) since the new legislation would become effective upon enactment, it clearly would be "impracticable" for the Commission to comply with the usual notice, comment, and advance publication procedure. For the purpose of invoking the section 553(d)(3) exemption from publishing advance notice of the interim rules 30 days prior to their effective date, the Commission found that the fact that the new legislation was effective upon enactment made such advance publication impossible and constituted "good cause" for the Commission not to comply with that requirement.

The Commission is cognizant that interim regulations should not respond to anything more than the exigencies created by the new legislation and expects that the final rules will emerge as a result of the congressionally mandated policy of affording public

[3] In addition to amending section 337 of the Tariff Act and repealing 19 U.S.C. 1337a, the Omnibus Trade Act contains provisions affecting the Commission's practice and procedure in antidumping the countervailing duty investigations, as well as investigations of import injury to industries, firms, or workers due to trade agreement concessions. For that reason, the Commission adopted interim revisions to 19 CFR Parts 206 and 207 (in addition to the interim revisions to Parts 210 and 211 that are set forth in this notice). The interim revisions to Parts 206 and 207 are published elsewhere in today's **Federal Register**.

participation in the rulemaking process.[4] Having been promulgated in response to exigencies created by the new legislation, most of the interim revisions in Parts 210 and 211 come under one or more of the following categories: (1) Revision of a preexisting rule that conflicted with the new legislation or was inconsistent with congressional intent expressed in its legislative history; (2) a technical revision to make a preexisting rule conform to the language or subsection designations of the new legislation; (3) a cross-reference to an interim rule that was added to an otherwise unrevised preexisting rule to achieve intra-Part consistency and to avoid confusion about how the unrevised provisions of the rule are to be applied in light of the interim rule provisions concerning the same subject matter; (4) reorganization or rewording of a preexisting rule to avoid confusion about how the rule is to be applied in light of the new legislation; or (5) a new rule covering a matter provided for in the new legislation but not covered by a preexisting rule. Final rules will be issued at a later date in accordance with the usual notice, public comment, and advance publication procedure.

The Commission also has determined, for the following reasons, that the interim rules contained in this notice are not subject to the provisions of Executive Order 12291 of February 17, 1981 (46 FR 13193, February 19, 1981) governing Federal regulation. Some of the interim rules pertain to administrative actions governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and thus are not "regulations" or "rules" within the meaning of section 1(a) of Executive Order 12291. The interim rules also do not qualify as "major rules" under section 1(b) of Executive Order 12291 because they do not result in (1) an annual effect on the economy of $100 million or more, (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises in domestic or export markets.

[4] *See American Federation of Government Employees, AFL–CIO* v. *Block*, 655 F.2d 1153, 1157–1158 (D.C. Cir. 1981). *See also United States* v. *Garner*, 767 F.2d 104, 120 (5th Circ. 1985) (quoting *American Federation of Government Employees, AFL–CIO* v. *Block*).

Explanation of the Interim Revisions in 19 CFR Part 210

Section 210.1

Section 210.1 describes the applicability of the rules in Part 210 and lists the statutory provisions that authorize the enactment of such rules. In order to bring § 210.1 into conformity with the new legislation, the following interim revisions have been made: (1) The reference to 19 U.S.C. 1337a has been deleted from § 210.1 because that statutory provision was repealed by the new legislation; [5] and (2) since the new legislation expressly authorizes the Commission to promulgate rules imposing sanctions for abuse of discovery and abuse of process in proceedings under section 337 of the Tariff Act,[6] section 337 is cited as one of the statutory provisions authorizing the Commission to promulgate the rules in Part 210.

Sections 210.2 and 210.4

The new legislation did not necessitate revision of these sections; the interim provisions are the same as the former provisions.

Section 210.5

Section 1342(a)(5)(B) of the Omnibus Trade Act creates a new subsection (h) of section 337 of the Tariff Act, which authorizes the Commission to prescribe rules for imposing sanctions for abuse of process in section 337 investigations to the extent sanctions could be imposed in Federal district courts under Rule 11 of the Federal Rules of Civil Procedure ("FRCP").

FRCP 11 requires the following:

(1) That every pleading, motion, or other paper filed by a party is to be signed by the party's attorney of record—or by the party himself if he is appearing pro se; and

(2) That the signature of the attorney or the party constitutes certification that—

(a) The signer has read the document,

(b) That to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law (or a good faith argument for extension, modification, or reversal of the existing law), and

(c) That the document is not being interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

FRCP 11 also provides sanctions for violations of its signing and certification provisions. If a document is not signed, FRCP 11 authorizes the court to strike the document from the record of the proceeding unless the document is signed promptly after the omission is called to the attention of the pleader or the movant. If the document is signed in violation of any of the certification provisions, the court upon motion or sua sponte can impose an appropriate sanction on the person who signed the document, the represented party, or both. Appropriate sanctions may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the document, including reasonable attorneys' fees.

The Commission rules that govern the signing and filing of written submissions in section 337 proceedings are § 210.5 of Part 210 ("Written submissions") and § 201.8(e) of Part 201 ("Identification of party filing document"). In order to bring § 210.5 into conformity with the signing, certification, and sanction provisions of FRCP 11, § 210.5 has been revised in the following manner:

(1) There is a new paragraph (b) of § 210.5. It corresponds to the relevant provisions of FRCP 11 (including the title) and incorporates the § 201.8(e) provision that signing a document constitutes certification that the signer was duly authorized to sign it.

(2) The previous paragraph (b) of § 210.5 has been redesignated paragraph (c) and retitled "Filing of documents," and the references to § 201.8(e) of Part 201 has been deleted.

(3) The previous paragraph (c) of § 210.5 has been deleted.

The Commission will determine at a later date whether to publish proposed rules governing the issuance of orders directing the payment of costs and attorneys' fees as a sanction for abuse of process.

Section 210.6

The previous enactment of section 337 of the Tariff Act did not contain provisions governing the handling of

[5] Section 1337a of title 19 of the U.S. Code provided that the importation of products made, produced, processed, or mined under or by means of a process covered by an unexpired, valid U.S. patent was cognizable under section 337 to the same extent as the importation of any product or article covered by the claims of a valid and unexpired U.S. Letters Patent. Section 1342(c) of the Omnibus Trade Act repealed that provision. Under the new section 337(a)(1)(B)(ii) of the Tariff Act (created by section 1342(a)(1) of the Omnibus Trade Act), the importation or sale of an article made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent is a violation of section 337 (provided that the other statutory elements of a violation exist).

[6] *See* section 337(h) of the Tariff Act, created by section 1342(a)(5)(B) of the Omnibus Trade Act.

confidential business information. Instead, the procedures for handling such information in section 337 proceedings were set forth in various Commission rules and in protective orders issued by the presiding ALJ in each investigation.[7]

Section 1342(a)(8) of the Omnibus Trade Act added a new subsection (n) to section 337 governing the handling of confidential business information in section 337 proceedings and imposing restrictions on the disclosure of such information without the consent of the submitter.

Section 210.6 of 19 CFR Part 210 has been revised on an interim basis in the following manner: (1) The previous provisions of § 210.6 now constitute paragraph (a) of that section; and (2) there is a new paragraph (b) corresponding to the new statutory restrictions on disclosure of confidential information and providing cross-references to other Commission rules pertaining to the handling and disclosure of such information.

Section 210.7

This section pertains to computation of time, additional hearings, postponements, continuances, and extensions of time in section 337 investigations. It previously provided that such matters are governed by the provisions of § 201.14 of Part 201. Since interim § 210.24(e) of Part 210 contains provisions that conflict with the provisions of § 201.14 (*e.g.*, intervening Saturdays, Sundays, and holidays are not excluded from the computation of time for filing certain documents under interim § 210.24(e)), the words "except as provided in § 210.24(e) (2), (7), and (17)" have been added to § 210.7 for intra-Part consistency and to prevent confusion.

Section 210.8

Section 210.8 identifies the general rule governing service of process and other documents in section 337 investigations. Because interim § 210.24(e) contains exceptions to the general rule concerning service of documents (*e.g.*, certain documents must be served in a manner other than by first class mail), the words "except as provided in § 210.24(e) (4), (7), and (17)" have been added to § 210.8 for intra-Part consistency and to avoid confusion.

Section 210.10

Paragraph (a) of § 210.10 requires, inter alia, that complainants file with the Commission 1 copy of the complaint for each person named in the complaint as a proposed respondent. (Those copies are subsequently served by the Commission pursuant to § 210.13 when the Commission institutes an investigation of the complaint.) The preexisting provisions of § 210.10 have not been changed, but the interim revisions to § 210.24(e) made it necessary to add clarifying language to § 210.10. Interim § 210.24(e)(4) requires complainants seeking temporary relief to serve copies of the complaint on all proposed respondents on the same day the complaint and motion for temporary relief are filed with the Commission. To avoid confusing prospective complainants, paragraph (a) of § 210.10 has been revised to indicate that complainants who are seeking temporary relief are to provide additional copies of the complaint and the motion for temporary relief for each proposed respondent and the appropriate foreign government notwithstanding the provisions of § 210.24(e)(4).

Section 210.11

The new legislation did not necessitate revision of this section; the interim provisions are the same as the former provisions.

Section 210.12

Section 210.12 discusses the manner in which the Commission institutes (or declines to institute) a section 337 investigation on the basis of a complaint. In its previous form, § 210.12 imposed a 30-day deadline for deciding whether to take such action (except in "exceptional circumstances"). Since interim § 210.24(e) (2), (7), and (8) provide exceptions to the 30-day deadline (other than the "exceptional circumstances" noted by the former § 210.12), the words "except as provided in § 210.24(e) (2), (7), and (8)" have been added to § 210.12 for intra-Part consistency and to avoid confusing prospective parties in section 337 proceedings. In addition, since interim § 210.24(e)(4) requires complainants seeking temporary relief to serve copies of the complaint and motion for temporary relief upon each proposed respondent the day the complaint and motion are filed with the Commission, § 210.12 has been revised to indicate that if the Commission determines not to institute an investigation, the proposed respondents (as well as the complainant) shall receive notice of the Commission's action.

Section 210.13

Section 210.13 was previously entitled "Service of complaint and notice of investigation" and discussed such service by the Commission upon institution of an investigation of the complaint. The substance of this section has not been changed, but it has been reworded for clarity. Additionally, because interim § 210.24(e)(4) requires complainants seeking temporary relief to serve copies of the complaint and motion for temporary relief on all proposed respondents on the same day the complaint and motion are filed with the Commission, the words "by the Commission" have been added to the title of § 210.13. The Commission also has added a provision to § 210.13 indicating that the complaint and notice of investigation are to be served by the Commission upon institution of an investigation despite the fact that complainant was required to serve a copy of the complaint on each proposed respondent pursuant to interim § 210.24(e)(4). Service of the complaint and notice of investigation by the Commission is the operative service for the purpose of computing the deadline for filing a response to the complaint.

Section 210.20

Section 210.20 specifies what information and materials must be provided in or with a complaint under section 337 of the Tariff Act in order for it to be considered "properly filed" and to result in the institution of an investigation. The preexisting § 210.20 of Part 210 essentially required all complaints to allege and make a prima facie showing of unfair methods of competition and unfair acts in the importation of articles into the United States or in their sale. All complaints also were required to specifically allege and provide corroborating information that the "effect or tendency" of the alleged unfair methods and acts was one of the following: (1) Destruction of or substantial injury to an efficiently and economically operated domestic industry; (2) prevention of the establishment of such an industry; or (3) restraint or monopolization of trade and commerce in the United States.

Section 1342(a)(1) of the Omnibus Trade Act amended subsection (a) of section 337 of the Tariff Act by altering the elements of a section 337 violation. Under the new law, all complaints must still allege (1) that the proposed respondents have engaged in unfair methods of competition and unfair acts in the importation or sale of the accused

[7] *See* § 201.6 (a) and (c) of 19 CFR Part 201; former §§ 210.6, 210.37, and 210.44 of Part 210; former § 211.52 of Part 211.

imported articles,[8] and (2) that there is a domestic industry for the type of articles in question or that such an industry is in the process of being established.[9] The definition of a domestic industry has been broadened for cases based on the alleged infringement of a valid and enforceable U.S. patent or a federally registered copyright, trademark, or mask work, and for cases based on the importation or sale of a product allegedly made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent.[10] However, complainants are no longer required to prove, in any type of case, that the relevant domestic industry is efficiently and economically operated.[11] An additional aspect of the new law is that the nature of the alleged unfair act or method will determine whether complainant will be required to prove that the respondents' unfair methods of competition and unfair acts have a "threat or effect" (instead of an "effect or tendency") to cause injury of some sort.[12] Complainants do not have to make such a showing in cases based on the alleged infringement of a valid and enforceable U.S. patent or a federally registered copyright, trademark, or mask work, or in cases based on the importation or sale of a product allegedly made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent.

In order bring § 210.20 of this Part into conformity with the new legislation, § 210.20 has been revised to correspond to the changed elements of a section 337 violation and to prevent confusion about what data must be provided with complaints based on various types of unfair methods and unfair acts.

Section 210.20 previously was divided into six paragraphs. Paragraph (a) listed the required contents of a section 337 complaint; paragraph (b) provided for the submission of samples of the subject domestic and imported articles as exhibits to the complaint; and paragraphs (c) through (f) listed the additional materials that had to be provided with complaints based on the alleged infringement of a patent, registered federal trademark, nonfederally registered trademark, or registered copyright, or the importation or sale of a product produced under a process covered by claims of a valid and unexpired U.S. patent.

The interim revisions to § 210.20 consist of changes in paragraph (a) and the addition of a new paragraph (g). Paragraphs (b) through (f) of § 210.20 have not been changed.

The Commission has made interim revisions to paragraphs (a)(3), (a)(6), (a)(7), (a)(8), (a)(9), and (a)(10) of § 210.20 to bring them into conformity with the new legislation or to reduce confusion about how substantively unmodified provisions of those paragraphs are to be satisfied in light of the new legislation.

Paragraph (a)(3) of § 210.20 requires that the complaint describe specific instances of alleged unlawful importations or sales. The former version of paragraph (a)(3) required the complaint to include the Tariff Schedules of the United States item number under which the subject article was imported. Section 1217(b) of the Omnibus Trade Act provides for the implementation of the Harmonized Tariff System of the United States, which will become effective on January 1, 1989. For that reason, paragraph (a)(3) of § 210.20 of the Commission's rules has been revised to state that for importations occurring prior to January 1, 1989, the complaint must include the Tariff Schedules of the United States item number under which the article was imported, and for importations occurring on or after January 1, 1989, the complaint must list the Harmonized Tariff Schedule of the United States heading or subheading under which the subject article was imported.

Paragraph (a)(6) of § 210.20 lists the information that must be provided with respect to the relevant domestic industry or the trade and commerce affected by the alleged unfair methods and acts. Paragraph (a)(6) has been revised (1) to correspond to the new statutory provisions concerning the relevant "domestic industry" and proof that such industry exists or is in the process of being established. It also has been revised by changing the phrase "effect or tendency" to "threat or effect" (to destroy or substantially injure a domestic industry).

Paragraph (a)(7) of § 210.20 provides for the submission of information concerning the complainant and its position vis-a-vis the relevant domestic industry or the trade or commerce affected by the proposed respondents' alleged unfair acts. In its preexisting form, paragraph (a)(7) required the complainant to submit certain data when the complaint was based on alleged infringement of an intellectual property right. The only specific types of intellectual property rights cases that are expressly referred to in the amended statute are infringement of a patent or a federally registered copyright, trademark, or mask work, and the importation or sale of a product made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent. (*See* section 337(a)(1) (B) through (D) and section 337(l) of the Tariff Act.) Section 337(a)(1)(A) of the amended statute does encompass, however, unfair methods of competition and unfair acts other than the aforesaid types. That provision would cover complaints based on alleged infringement of a common-law trademark or misappropriation of a trade secret. The Commission has therefore revised paragraph (a)(7) of § 210.20 to make it clear that the term "intellectual property right" as used in that paragraph is not limited to patents or federally registered copyrights, trademarks, or mask works.

In its preexisting form, paragraph (a)(8) of § 210.20 required that complainants submit information supporting the injury theory set forth in the complaint. As explained previously, under the new law, complainants do not have to prove injury in cases based on alleged infringement of a patent or a federally registered copyright, trademark, or mask work, or in cases based on the importation or sale of an article allegedly made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent. The Commission accordingly has revised paragraph (a)(8) of § 210.20 to make it clear that injury data are to be provided only with respect to alleged violations based on unfair methods and acts other than the aforesaid types.

To be consistent with the new industry provision and the reworded injury provisions of section 337 of the

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[8] *See generally* section 1342(a)(1) of the Omnibus Trade Act; section 337(a) (1) and (4) of the Tariff Act.

[9] *See* section 1342(a)(1) of the Omnibus Trade Act; section 337(a) (1), (2), and (3) of the Tariff Act. *See also* H.R. Rep. No. 40, 100th Cong., 1st Sess. 156–158 (1987); S. Rep. No. 71, 100th Cong., 1st Sess. 129–130 (1987); H.R. Rep. No. 576 at 633–634.

[10] *See* section 1342(a)(1) of the Omnibus Trade Act; section 337(a) (2) and (3) of the Tariff Act.

[11] *See* H.R. Rep. No. 40 at 154–156; S. Rep. No. 71 at 127–129; H.R. Rep. No. 576 *supra*.

[12] The injury requirement has been eliminated entirely for alleged violations based on infringement of a patent or a federally registered patent, copyright, trademark, or mask work, and for alleged violations based on the importation or sale of a product made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent. *See* section 1342(a)(1) of the Omnibus Trade Act; section 337(a)(1) (B), (C), and (D) of the Tariff Act; H.R. Rep. No. 40 at 154–156; S. Rep. No. 71 at 127–129; H.R. Rep. No. 576 at 633. The substitution of the word "threat" for "tendency" is intended to codify previous Commission practice with respect to its interpretation of the word "tendency," under which it construes "tendency" as "threat." The wording change is not intended to introduce a new standard for proving injury. *See* H.R. Rep. No. 576 at 633.

Tariff Act, paragraph (a)(8) of § 210.20 also has been revised by changing the phrase "effect or tendency" to "threat or effect" and by changing the phrase "efficiently and economically operated domestic industry" to "domestic industry."

In its previous form, paragraph (a)(9) of § 210.20 required certain information relating to the patent in controversy when the complaint was based on "the alleged unauthorized importation or sale of an article covered by, or produced under a process covered by, the claims of a valid U.S. letter patent." Paragraph (a)(9) of § 210.20 has been revised to correspond to the language of the new section 337(a)(1)(B) of the Tariff Act. It now refers to the provision of certain information when the complaint is based on "the infringement of a valid and enforceable U.S. patent or the importation or sale of a product allegedly made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent."

Paragraph (a)(10 of § 210.20 formerly required complainants who sought temporary relief to file a separate motion for such relief along with the complaint in accordance with preexisting § 210.24(e). Paragraph (a)(10) of § 210.20 has been revised to be consistent with interim paragraphs (e)(1) through (3) of § 210.24, which allow motions for temporary relief to be filed concurrently with the complaint or prior to the institution of an investigation but not after such institution.

The final revision of § 210.20 consists of the addition of a new paragraph (g) requiring the submission of material to document the existence of a federally registered mask work when the complaint is based on the alleged infringement of that type of intellectual property right.

Section 210.21

Section 210.21 governs the content and filing of responses to complaints and notices of investigation. Paragraph (a), which pertains to the time for filing such a response, has been revised to include the exception to the 20-day response deadline provided for in interim § 210.24(e)(9).

Sections 210.22 and 210.23

The new legislation did not necessitate revision of these sections; the interim provisions are the same as the former provisions.

Section 210.24

The new legislation has altered the previous temporary relief provisions of section 337 of the Tariff Act (*i.e.*, the former subsections (e) and (f) of section 337) in the following manner:

(1) There are now statutory deadlines for determining whether to order temporary relief—*viz.*, 90 days after institution in an ordinary investigation and up to 150 days after institution in a "more complicated" investigation.[13] (Institution occurs when the Commission's notice of investigation is published in the **Federal Register**. *See* interim § 210.12.)

(2) Complainants may be required to post a bond as a prerequisite to obtaining temporary relief,[14] and if the Commission ultimately determines that respondents have not violated section 337, the bond may be forfeited to the U.S. Treasury.[15]

(3) The Commission now has express authorization to issue temporary cease and desist orders in addition to (as well as in lieu of) temporary exclusion orders.[16]

(4) The Commission is authorized to grant preliminary (*i.e.*, temporary) relief to the same extent that preliminary injunctions and temporary restraining orders may be granted by Federal courts under the FRCP.[17]

The previous paragraph (e) of § 210.24 addressed only the content and filing the motions for temporary relief and responses thereto. The interim revisions to paragraph (e) of § 210.24 include revisions of the former provisions and the addition of new provisions governing all other aspects of the temporary relief decision-making process.[18] The principal objectives of the interim revisions are to expedite the decision-making process and to accommodate the new statutory deadlines for determining whether to order temporary relief.

The new legislation does not require any change in the substantive information that must be provided with the motion for temporary relief. The previous provisions of § 210.24(e) that pertained to the content of motions for temporary relief thus have been retained. However, because of the limited time available for discovery pertaining to the motion after an investigation is instituted, each complainant seeking temporary relief is now required to file along with the motion all evidence and information in its possession that complainant intends to submit in support of the motion, in addition to the usual affidavits. *See* paragraph (e)(1) of interim § 210.24.

The previous provisions pertaining to the filing of motions for temporary relief have been revised so that complainants may file motions for temporary relief concurrently with the complaint, or at any time prior to the Commission's decision on whether to institute an investigation, but not after an investigation has been instituted. *See* paragraphs (e)(1), (2), and (3) of interim § 210.24. A prohibition on the post-institution filing of motions for temporary relief was adopted because: (1) The deadline for completing the temporary relief decision-making process is measured from the date the investigation was instituted, not the filing date of the motion; (2) the stringent statutory deadlines will benefit complainants, but will pose a substantial burden on respondents, the Commission investigative attorney, the presiding ALJ, and the Commission; and (3) a reduction of investigation time resulting from the complainant's delay in seeking temporary relief (even if the delay was justified) would be prejudicial to the rights of the other parties and could jeopardize the Commission's ability to adjudicate the motion in a timely fashion.

The interim revisions provide that when a motion for temporary relief is filed after the compliant but before the Commission has determined whether to institute an investigation based on the complaint, the 35-day period allotted for review of the complaint and the motion for temporary relief and for informal investigative activity will begin to run anew from the date on which the motion was filed. *See* paragraphs (e) (2) and (8) of interim § 210.24.

The interim revisions to § 210.24(e) also contain new provisions concerning service by complainants of motions for temporary relief. Under former provisions of Part 210, motions for temporary relief were not served on the respondents until an investigation had been instituted. If the motion was filed along with the complaint, the motion was served by the Commission along with the complaint and notice of investigation after institution. If the motion was filed after the complaint, complainant served it on the

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[13] Section 1342(a)(3)(B) of the Omnibus Trade Act; section 337(e)(2) of the Tariff Act.

[14] *Id. See also* H.R. Rep. No. 576 at 633–636. *See supra* n.2 regarding interim rules governing the posting of temporary refief bonds by complainants.

[15] *See* H.R. Rep. No. 576 at 635–636. *See supra* n.2 regarding bond forfeiture rules.

[16] Section 1342(a)(4)(A) of the Omnibus Trade Act; section 337(f) of the Tariff Act.

[17] *See* section 1342(a)(3)(B) of the Omnibus Trade Act; section 337(e)(3) of the Tariff Act.

[18] The new interim provisions governing temporary relief have been added to interim § 210.24 for convenience and to avoid having to renumber sections in Part 210 because of the insertion of new interim provisions. The final provisions governing temporary relief may be set out in one or more new sections.

respondents. *(See* former §§ 210.13 and 210.24(e)(1).)

The interim revisions to § 210.24(e) make the following provisions concerning service of motions for temporary relief:

(1) The previous rule provisions requiring service by the Commission upon institution of an investigation will remain in force. However, paragraph (e)(4) of interim § 210.24 now provides that a complainant seeking temporary relief must serve nonconfidential copies of the complaint and a motion for temporary relief (including nonconfidential copies of all materials or documents attached thereto) on all proposed respondents and on the embassy in Washington, DC of the foreign country(s) represented by the proposed respondents. Such service is to be made on the same day that the complaint and motion for temporary relief are filed with the Commission. The Commission believes that such service is necessary and appropriate because the time for responding to motions for temporary relief must be substantially reduced in light of the short statutory deadlines for determining whether to grant or deny the motion. (See the discussion below). The Commission notes further that giving proposed respondents advance notice of the allegations against them will enable them to consult an attorney and to decide prior to the tolling of the period for filing a response to the motion for temporary relief what course of action to pursue if an investigation is instituted. The Commission also hopes that service of the complaint and motion for temporary relief on the day both documents are filed with the Commission will reduce the number of respondents who will request extensions of the deadline within which to respond to the motion for temporary relief.

(2) In order to give proposed respondents the benefit of at least 30 full days in which to make the necessary preliminary arrangements, the revisions to § 210.24(e) require (1) that service of the complaint and motion for temporary relief be effected by the fastest possible means and (2) that the Commission will decide whether to institute an investigation within 35 days (rather than 30 days) after the complaint and motion are filed. *See* paragraphs (e) (4) and (8) of interim § 210.24. The revisions provide further that a signed certificate of service must accompany the complaint and motion for temporary relief. If the certificate does not accompany the complaint and the motion, the Secretary shall not accept the complaint or the motion and shall promptly notify the submitter. Actual proof of service (or proof of a serious effort to make service)—*e.g.*, certified mail return receipts, courier or overnight delivery receipts, or other proof of delivery—need not be filed with the complaint and motion, but should be retained by the complainant in the event that the complainant is requested to provide actual proof of service. *See* paragraph (e)(4) of interim § 210.24.

(3) Any purportedly confidential business information which is deleted from the nonconfidential service copies of the complaint and motion for temporary relief must satisfy the requirements of § 201.6(a) of Part 201 (which defines confidential information for purposes of Commission proceedings). Despite such deletions, the nonconfidential service copies must contain enough factual information about each element of the violation alleged in the complaint and the motion for temporary relief to enable each proposed respondent to comprehend the allegations against it. *See* paragraph (e)(5) of interim § 210.24.

(4) The service copies of the complaint and motion for temporary relief must be accompanied by a notice (in a form prescribed by paragraph (e)(6) of interim § 210.24) explaining that the service of the complaint and motion does not initiate an investigation. The notice must state the date on which the complaint and motion for temporary relief are to be filed with the Commission. The prescribed text of the notice also summarizes the provisions of interim §§ 210.10 through 210.13 concerning (1) the commencement of section 337 proceedings, (2) the action of the Commission upon receipt of the complaint, (3) the institution of an investigation, and (4) service by the Commission of the complaint and the motion for temporary relief. Copies of the notice must be filed along with the proof of service. *See* paragraph (e)(6) of interim § 210.24.

The interim revisions to § 210.24(e) also contain new provisions concerning preinstitution processing of motions for temporary relief. Each motion for temporary relief will be processed concurrently with and in the same manner as the complaint. In other words, the Commission will examine the motion for its sufficiency and compliance with the pertinent rules and will conduct informal investigative activity relating to the motion as needed. The Commission also will determine whether to accept a motion for temporary relief at the same time it determines whether to institute an investigation on the basis of the complaint.[19] Commission rejection of an insufficient or improperly filed complaint will preclude acceptance of a motion for temporary relief. However, Commission rejection of a motion for temporary relief will not preclude institution of an investigation of the complaint. *See* paragraph (e)(8) of interim § 210.24.

The interim revisions to § 210.24(e) also contain new provisions pertaining to amendment of motions for temporary relief. Amendment before an investigation is instituted is a matter of right. However, all material filed to supplement or amend the motion must be served on all proposed respondents and on the embassies of foreign governments that they represent. If the amendment expands the scope of the motion, the 35-day period allotted for determining whether to institute an investigation and to initiate temporary relief proceedings shall begin to run anew from the date the amendment is filed with the Commission. *See* paragraph (e)(7) of interim § 210.24.

The interim revisions to § 210.24(e) also contain new provisions pertaining to the filing of responses to motions for temporary relief. Under the former § 210.24(e), respondents and the Commission investigative attorney had 20 days to file such responses if the motion for temporary relief was filed with the complaint. If the motion was filed after an investigation had been instituted, responses were due 10 days after service of the motion.

In light of the short statutory deadlines for concluding the temporary relief proceedings and the fact that respondents will have prior notice of the complaint and motion for temporary relief, the Commission determined that the period for responding to the motion for temporary relief (and the complaint) must be reduced to 10 days (plus additional time if service pursuant to § 210.13 was by mail). Because a respondent's response to the complaint and notice of investigation helps to define the issues in a section 337 investigation, each respondent's response to the complaint and notice also must be filed in 10 days, along with its response to the motion for temporary relief. *See* paragraph (e)(9) of interim § 210.24.

With respect to adjudication of motions for temporary relief, interim

[19] Such acceptance will constitute provisional acceptance for purposes of referring the motion to an ALJ for issuance of an ID, and the ALJ is not precluded from subsequently issuing an ID dismissing the motion if appropriate reasons exist for doing so.

§ 210.24(e) essentially retains the bifurcated process utilized under the former rules—*i.e.*, (1) use of the ID/discretionary Commission review procedure to determine whether there is reason to believe that section 337 has been violated, and (2) Commission determination of the issues of the appropriate form of relief, whether the public interest factors enumerated in the statute preclude such relief, and the amount of the bond under which the respondents' merchandise will be permitted to enter the United States during the pendency of the investigation and the temporary relief order.[20] However, the interim rule provisions modify that process somewhat, in the manner described below.

Interim § 210.24(e) contains new provisions stating that after the motion has been referred to an ALJ, the ALJ has discretion to determine the following matters: (1) The extent to which the parties will be permitted to engage in discovery; (2) the form and extent of the evidentiary hearing, if such a hearing is conducted; and (3) the extent to which parties will be permitted to file proposed findings of fact, proposed conclusions of law, and briefs pursuant to interim § 210.52. *See* paragraphs (e) (10), (12), (13), and (14) of interim § 210.24. In light of the stringent statutory deadlines for concluding the temporary relief phase of an investigation, the ALJ's decision on the aforesaid matters is not reviewable on the basis of a petition filed pursuant to interim § 210.54 (discretionary Commission review of an ID) or on the basis of an application for interlocutory appeal filed pursuant to § 210.70. *See* paragraph (e)(15) of interim § 210.24.

Since the legislative history of the new legislation indicates that the Commission should not grant temporary exclusion orders without an inter partes APA hearing [21] and the Commission intends to follow the same procedure when determining whether to grant a temporary cease and desist order, the interim revisions to § 210.24(e) provide that no hearing will be held if summary judgment is granted for the respondents (*i.e.*, if temporary relief is denied on that basis). *See* paragraph (e)(13) of interim § 210.24. The interim revisions further provide that the Commission's acceptance of a motion for temporary relief prior to the institution of an investigation is a provisional acceptance for purposes of referring the motion to the ALJ and that the ALJ is not precluded from issuing an ID dismissing the motion without a hearing if the facts and circumstances so warrant. *See* paragraphs (e) (8) and (13) of interim § 210.24

With regard to designating an investigation "more complicated," the Commission notes that there may be cases in which additional time is needed for the adjudication of motions for temporary relief, but not for the final disposition of the investigation. The interim revisions to § 210.24(e) therefore provide that an investigation may be designated "more complicated" for the purpose of extending the deadline for deciding whether to order temporary relief and/or for the purpose of extending the statutory deadline for completing the investigation. *See* paragraph (e)(11) of interim § 210.24 (*See also* paragraphs (a) and (b) of interim § 210.59.) The revisions to § 210.24(e) further provide that if warranted, the Commission may designate an investigation "more complicated" for purposes of adjudicating the motion for temporary relief at the same time it determines whether the motion is properly filed and should be forwarded to the ALJ. However, since it is not always possible to gauge the complexity of a temporary relief motion from the face of the motion or the corroborating documentation, the interim revisions also authorize the ALJ to issue an order, sua sponte or on motion, designating an investigation "more complicated" for the purpose of extending the deadline for issuing the temporary relief ID and the Commission's deadline for determining whether to grant or deny such temporary relief. Such an order by the ALJ constitutes a final Commission determination, and notice of the order shall be published in the **Federal Register** as required by the statute and interim § 210.59. *See* paragraph (e)(11) of interim § 210.24.[22]

Another noteworthy difference between the former rules and the interim revisions is that under the interim rules, the ALJ may compel discovery pertaining to the issues of the appropriate form of temporary relief, whether the public interest factors enumerated in the statute preclude the issuance of such relief, and the amount of the bond under which respondents' merchandise will be permitted to enter the United States during the pendency of the investigation and any temporary relief order issued in response to the motion.[23] The ALJ may, but will not be required to, take evidence on those issues at the hearing or to address them in the ID on whether there is reason to believe a violation exists. However, as part of the standard analysis for determining whether to grant or deny a motion for temporary relief, the ALJ should take evidence and the ID should address the question of what effect the form of relief requested in the motion would have on the public interest. *See generally* paragraphs (e)(12), (13), (17) and (18) of interim § 210.24.

In order to accommodate the new statutory deadlines for determining whether to order temporary relief, the interim revisions to § 210.24(e) provide that in an ordinary investigation, the ID is to be issued within 70 days after publication of the notice of investigation in the **Federal Register** in an ordinary case, and within 120 days after such publication in a "more complicated" investigation. *See* paragraph (e)(17) of interim § 210.24. The interim rules also provide that the record relating to all temporary relief issues should be certified to the Commission as soon as possible after the close of reception of evidence, rather than certifying the record of the Commission concurrently with the ID. *See* paragraph (e)(16) of interim § 210.24. The advance certification provision was added in order to facilitate prompt and timely Commission action (if any) with respect to the ID and with respect to the issues of the appropriate form of relief, the public interest factors enumerated in the statute, and bonding by complainant and respondents.

The interim rules also contain new provisions pertaining to the disposition of a temporary relief ID after it has been issued. In order to comply with the statutory deadlines for determining whether to grant temporary relief, the ID will become the Commission's determination 20 calendar days after issuance (not service) thereof in an ordinary case, and 30 calendar days after issuance in a "more complicated" investigation—unless the Commission modifies or vacates the ID within that period. Such modification or vacation may be ordered on the basis of errors of law or policy reasons articulated by the Commission. The existence of alleged

[20] When the interim bonding rules are promulgated (*see supra* n.2), they may provide that the Commission also will determine whether complainant should be required to post a bond as a prerequisite to obtaining temporary relief and, if so, the amount of the bond.

[21] H. R. Rep. No. 576 at 635.

[22] Motion to designate an investigation "more complicated" for the purpose of extending the deadline for concluding the entire investigation and determining whether there is a violation of section 337 will continue to be decided according to the ID/discretionary review procedure. *See* interim §§ 210.53(c) and 210.59 (a) and (b).

[23] As stated in n. 2 *supra*, interim rules pertaining to the posting of temporary relief bonds by complainants will be set forth in a separate notice to be published at a later date.

errors of fact will not be considered. *See* paragraph (e)(17) of interim § 210.24.

In order to assist the Commission in determining whether modification or revocation is warranted, all parties will be permitted to file written comments concerning the presence (or absence) of errors of law in the ID or policy reasons that justify such action (or which show that it would not be justified). Such comments will be limited to 30 pages and must be filed no later than 7 calendar days after issuance of the ID in an ordinary case and 10 calendar days after issuance of the ID in a "more complicated" investigation. (Because of time constraints imposed by the new statutory deadlines for determining whether to order temporary relief, additional time for IDs served by mail will not be allotted.) *See* paragraph (e)(17) of interim § 210.24.

In keeping with the Commission's statutory obligation to consult with and to seek advice and information from other federal agencies in section 337 proceedings, other agencies will be given an opportunity to file comments on the ID. *See* paragraph (e)(17) of interim § 210.24

Each party may file a response to other parties' comments within 12 calendar days after issuance of the ID in an ordinary case and within 14 days after issuance of the ID in a "more complicated" investigation. (Again, because of the constraints imposed by the statutory deadlines, additional time if service of the initial comments was by mail will not be provided. The parties thus are expected to cooperate in this matter and facilitate the filing of timely and useful responses by serving their initial comments on each other by the fastest means available. The reply comments will be limited to 15 pages. *See* paragraph (e)(17) of interim § 210.24

For purposes of determining (1) the appropriate form of temporary relief (if such relief is to be granted), (2) whether the statutory public interest factors preclude such relief, and (3) the amount of the bond under which respondents' merchandise will be permitted to enter the United States during the pendency of the investigation and any temporary relief order issued in response to the motion, the procedure set forth in paragraph (e)(18) of interim § 210.24 is as follows:

(1) While the motion for temporary relief is before the ALJ, he will supervise and, if necessary, will compel discovery on the remedy, public interest, and bonding issues as specified in paragraphs (e) (12), (13), and (17) of interim § 210.24.

(2) On the 60th day after institution in an ordinary case, or on the 105th day after institution in a "more complicated" investigation, all parties may file written submissions addressing those issues. *See* paragraph (e)(18) of interim § 210.24.

(3) The ALJ will certify the record to the Commission as soon as possible after the closing of the reception of evidence (as discussed above) and on the 70th day after institution in an ordinary investigation or on the 120th day after institution in a "more complicated" investigation, the ALJ will issue a temporary relief ID. *See* paragraphs (e) (16) and (17) of interim § 210.24. The ALJ may address in the ID the remedy, public interest, and bonding issues that will be considered by the Commission, but he is not required to do so. The only public interest issue that the ID must address is that of the effect the form of relief requested in the motion would have on the public interest. *See* paragraph (e)(17) of interim § 210.24. However the ALJ's findings on the public interest may be superceded by Commission findings on that issue, as discussed below. *See* paragraph (e)(18) of interim § 210.24.

(4) On or before the statutory deadline for determining whether to order temporary relief, the Commission will determine: (a) What form of relief is appropriate in light of any violation that appears to exist (notwithstanding the form of relief complainant may be seeking); (b) whether the public interest factors enumerated in the statute preclude such relief; and (c) the amount of the bond under which the respondents' merchandise will be permitted to enter the United States during the pendency of any temporary relief order issued by the Commission.[24] In the event that Commission findings on the public interest are inconsistent with findings made by the administrative law judge in the initial determination, the Commission's findings are controlling. *See* paragraph (e)(18) of interim § 210.24.

The previous enactment of section 337 made no express provision for the issuance of affirmative final determinations and remedial orders in situations in which one or more of the respondents defaults. The Commission took such action, however, pursuant to former § 210.25. Section 1342(a)(5)(B) of the Omnibus Trade Act amends section 337 by adding a new subsection (g), which authorizes the Commission to (1) reach an affirmative final determination concerning the violation of section 337 with respect to defaulting respondents, and (2) issue a limited or general exclusion order or a cease and desist order if certain conditions are met.

[24] *Id.*

Section 210.25

The new legislation differs from the Commission's previous default practice in the following respects: Paragraph (c) of former § 210.25 authorized the Commission to draw adverse inferences against defaulting respondents in determining whether complainant had made a prima facie case of a section 337 violation. However, such inferences could be drawn only "with respect to those issues for which the complainant has made a good faith but unsuccessful effort to obtain evidence." The new legislation permits more liberal use of adverse inferences if the complainant is seeking relief limited to the defaulting respondent. Specifically, the new legislation provides that "the Commission shall presume the facts alleged in the complaint to be true" as long as the grounds for default have been satisfied.[25] It thus establishes a pure default rule (similar to federal district court practice) in cases in which the complainant is seeking limited relief against a particular respondent.

In order to bring § 210.25 into conformity with the new legislation, paragraph (c) of § 210.25 ("Relief against a respondent in default") has been revised to conform to the language and provisions of the new legislation (and its legislative history, where appropriate). The Commission has retained the previous provision of § 210.25 that authorizes the Commission to utilize adverse inferences in determining whether section 337 has been violated in a default case where complainant is seeking a general exclusion order.

The previous paragraphs (a) and (b) of § 210.25 (which provide the definition of default and the procedure for determining default) are not inconsistent with the provisions of the new legislation and therefore have not been revised, except that the reference in paragraph (a) to failure to file a response to the complaint and notice of investigation within the time provided in interim § 210.21 has been changed to refer to interim § 210.24(e)(9) as well as interim § 210.21.

Section 210.26

The new legislation did not necessitate revision of this section; the interim provisions are the same as the former provisions.

[25] Section 1342(a)(5)(B) of the Omnibus Trade Act; section 337(g)(1) of the Tariff Act.

Section 210.30

Section 210.30 sets forth general provisions governing discovery. Paragraph (c) of that section discusses general limitations on discovery. For clarity—and to be consistent with the provisions of interim § 210.24(e)(12) which give the ALJ discretion to control the nature and extent of discovery pertaining to a motion for temporary relief—§ 210.30(c) has been revised to state that the ALJ shall limit the kind or amount of discovery to be had, or the period during which discovery may be carried out, in a manner that is consistent with the time limitations set forth in paragraph (e)(17) of interim § 210.24 for adjudicating motions for temporary relief or the time limitations imposed by interim § 210.53(a) for issuing an ID on permanent relief. The other provisions of § 210.30 have not been changed.

Sections 210.31 through 210.35

The new legislation did not necessitate revision of these sections; the interim provisions are the same as the former provisions.

Section 210.36

As noted above, section 1342(a)(5)(B) of the Omnibus Trade Act created a new subsection (h) of section 337, which authorizes the Commission to prescribe rules for imposing sanctions for abuse of discovery in section 337 investigations to the extent sanctions could be imposed by a Federal district court under Rule 37 of the FRCP.

The Commission rule governing sanctions for abuse of discovery is § 210.36. It has not been revised, for the following reasons. The existing provisions of § 210.36 provide sanctions that are comparable to those available under FRCP 37, except that there is no provision for a sanction order directing payment of a party's costs and attorneys' fees. The Commission will determine at a later date whether to publish proposed rules governing the issuance of orders directing the payment of costs and attorneys' fees as a sanction for abuse of discovery.

Section 210.37

The new legislation did not necessitate revision of this section; the interim provisions are the same as the former provisions.

Section 210.40

The new legislation did not necessitate revision of this section; the interim provisions are the same as the former provisions.

Section 210.41

Section 210.41 sets forth general provisions governing hearings in section 337 investigations. Paragraph (a) has been revised to include a cross-reference to paragraph (e)(13) of interim § 210.24 concerning the ALJ's discretion as to the conduct of a hearing on motions for temporary relief. No other changes have been made in this section.

Section 210.42

The new legislation did not necessitate revision of this section; the interim provisions are the same as the former provisions.

Section 210.43

Section 210.43 defines what constitutes the administrative record in a section 337 proceeding. It also sets forth procedures for reporting and transcribing hearings, correcting hearing transcripts, and certifying the record to the Commission concurrently with an ID or at such time as the Commission may order. The only revision is the insertion of the phrase "except as provided in § 210.24(e)(16) of this part" at the beginning of paragraph (d) of § 210.43. This change was made in order to maintain intra-Part consistency and to reiterate that certification of the record of a temporary relief proceeding may occur prior to issuance of the temporary ID.

Section 210.44

Section 210.44 makes provision for in camera treatment of confidential information. Paragraph (a) of § 210.44(a), which defines in camera treatment for purposes of a section 337 investigation, has been revised (1) to conform to the new statutory restrictions on disclosure of confidential information and (2) to include cross-references to the other Commission rule concerning the same subject matter, namely interim § 210.6. Paragraph (e) of § 210.44—which provides for "declassification" (*i.e.*, removal of the confidential designation from information so designated by the submitter)—also has been revised (1) to conform to the new statutory provision which indicates that the confidentiality of information submitted or exchanged among the parties is determined by the Commission's rules, and (2) to be consistent with section 1342(a)(8) of the Omnibus Trade Act, which created a new subsection (n) of section 337 providing that information that is (properly) designated confidential by the submitter cannot be declassified and publicly disclosed without the consent of the submitter.

Section 210.50

The new legislation did not necessitate revision of this section. The interim provisions of § 210.50 are the same as the former provisions, except that a cross-reference to paragraph (e)(17) of interim § 210.24 has been added to paragraph (f) of § 210.50. Paragraph (f) previously stated that an administrative law judge's order of summary determination constituted an initial determination under § 210.53. Since paragraph (e)(13) of interim § 210.24 contemplates the possible issuance of a summary determination a motion for temporary relief by an administrative law judge and states that such a ruling shall be in the form of an initial determination under paragraph (e)(17) of interim § 210.24, the cross-reference to paragraph (e)(17) of interim § 210.24 was necessary for intra-Part consistency.

Section 210.51

The previous enactment of section 337 made no provision for the Commission to terminate an investigation in whole or in part on the basis of a settlement agreement or a consent order without a concurrent determination as to whether section 337 had been violated. Prior to the enactment of the new legislation, the Commission took such action on the basis of authority derived from the APA.

Section 1342(a)(2) of the Omnibus Trade Act amends subsection (c) of section 337 to give the Commission express authority to take such action. Section 210.51 of the Commission's rules, which governs termination of investigations, has been revised by adding, to paragraphs (b) and (c) of that section, a citation to the new statutory provision that authorizes the Commission to order terminations on the basis of a settlement agreement or a consent order without making a determination as to whether section 337 has been violated. Since the statute indicates that such terminations "may" be ordered without making a determination as to whether a violation has occurred and it is possible that there may be instances in which such a determination would be appropriate, paragraphs (b) and (c) have been further revised to indicate that the Commission can, but is not required to, make a violation determination when it terminates an investigation in whole or in part on the basis of a settlement agreement or consent order.

Section 210.51 also has been revised by including the word "settlement" before "agreement," where appropriate, in order to make it plain that the

licensing and other agreements discussed in that section are "settlement agreements" for purposes of the amended statute.

Section 210.52

Section 210.52 governs the filing of proposed findings of fact, proposed conclusions of law, and briefs by the parties. The former § 210.52 gave parties the right to file such documents with no restrictions on subject matter, page length, or the time of filing (except that the presiding ALJ was given some discretion to determine the time for filing such documents after an evidentiary hearing under former § 210.41). Section 1342(a)(3)(B) of the Omnibus Trade Act amends subsection (e) of section 337 by creating statutory deadlines for determining whether to grant or deny temporary relief. For that reason and in order to be consistent with paragraph (e)(14) of interim § 210.24 of the Commission's rules (which allows the ALJ to determine to what extent the parties will be permitted to file proposed findings of fact, proposed conclusions of law, and briefs), the words "except as provided in § 210.24(e)(14)" have been inserted into the first sentence of § 210.52 of the rules.

Section 210.53

Former § 210.53 governed the issuance and disposition of IDs for all matters that were to be adjudicated by the ID/discretionary review procedure—including motions for temporary relief and motions for designating an investigation "more complicated." In light of the interim revisions to § 210.24(e) concerning those matters, the phrase "except as provided in § 210.24(e)" or similar clarification has been inserted into paragraphs (b), (c), (h), and (i) of § 210.53. These changes were made to indicate that Commission review of and the finality of IDs pertaining to temporary relief and ALJ determinations to designate an investigation "more complicated" for purposes of adjudicating a motion for temporary relief are governed by interim § 210.24(e) and not interim § 210.53.

Because interim § 210.59(c) contains new provisions concerning the issuance of IDs designating an investigation "complicated" (see the discussion below), paragraph (c) of § 210.53 has been revised to cover IDs on that issue as well.

Section 210.54

Former § 210.54 governed the filing and disposition of petitions for review of IDs, including those pertaining to the grant or denial of temporary relief. In light of the interim revisions to §§ 210.24(e) and 210.53, § 210.54 has been revised to indicate that (1) paragraph (e)(17) of interim § 210.24 (and not § 210.54) governs the parties' ability to challenge IDs pertaining to temporary relief, and (2) and ALJ's determination to designate an investigation "more complicated" to obtain more time to adjudicate a motion for temporary relief is not reviewable since it constitutes a final determination of the Commission pursuant to paragraph (e)(11) of the interim § 210.24.

Section 210.55

Section 210.55 governs review of an ID on the Commission's own initiative rather than in response to a petition for review. In order to conform to interim §§ 210.24(e), 210.53 and 210.54, § 210.55 has been revised to indicate that (1) paragraph (e)(17) of interim § 210.24 (and not § 210.54) governs the parties' ability to challenge IDs pertaining to temporary relief, and (2) an ALJ's determination to designate an investigation "more complicated" to obtain more time to adjudicate a motion for temporary relief is not reviewable since it constitutes a final determination of the Commission pursuant to paragraph (e)(11) of interim § 210.24.

Section 210.56

Section 210.56 governs the process of reviewing of IDs. The former provisions of this section discussed (1) the filing of briefs, (2) requests for oral argument, (3) the scope of the review, (4) what action the Commission could take upon completion of the review, and (5) the time limits for concluding a review of an ID concerning temporary relief. The same types of revisions that were made in §§ 210.54 and 210.55 have been made in § 210.56.

Section 210.57

Former paragraph (c) of § 210.57 provided (1) that all Commission actions except exclusion orders generally are enforceable when the affected party received notice of such action, and (2) that exclusion orders are enforceable when the Secretary of the Treasury receives notice of such orders.

Section 1342(a)(5)(B) of the Omnibus Trade Act amended section 337 of the Tariff Act by creating a new subsection (i), which authories the Commission, if certain conditions are met, to order seizure and forfeiture of articles imported in violation of an outstanding permanent (and final) exclusion order. In cases in which such seizure and forfeiture is ordered, the Commission must notify the Secretary of the Treasury and, upon receipt of the order, the Secretary must enforce it in accordance with the procedure set forth in the statute.

Paragraph (c) of § 210.57 of the rules has been revised to indicate that all Commission actions except exclusion orders and seizure and forfeiture orders generally are enforceable when the affected party receives notice of such action, and that exclusion and seizure and forfeiture orders are enforceable when the Secretary of the Treasury receives notice of such orders.

Former paragraph (d) of § 210.57 has been revised to correct a typographical error in the first sentence, which made the sentence unintelligible.

Section 210.58

Section 210.58 governs the Commission's adjudication of the issues of remedy, the public interest, and bonding in section 337 investigations. The following revisions have been made in this rule.

(1) The previous enactment of section 337 of the Tariff Act provided that if the Commission determined that there was a violation of section 337, the Commission could order exclusion of the subject imports or, in lieu of exclusion, the Commission could issue cease and desist orders. (The same rule applied for temporary relief.) Section 1342(a)(4)(A) of the Omnibus Trade Act amended subsection (f) of section 337 by giving the Commission express authority to issue cease and desist orders in addition to (as well as in lieu of) exclusion orders. Revisions have been made in paragraph (a) of § 210.58 of the Commission's rules in order to correspond to the change in the statutory relief provisions.

(2) As discussed above in connection with interim § 210.25, the new legislation also makes provision for the issuance of "general" or "limited" exclusion orders. (*See* section 1342(a)(5) of the Omnibus Trade Act creating a subsection (g) of section 337.) Paragraph (a) of § 210.58 of the Commission's rules has been modified to make explicit the option available to the Commission in determining whether to order articles to be excluded from entry into the United States.

(3) The reference in paragraph (a) of § 210.58 to the bonding provision of former subsection (g)(3) of section 337 has been changed to "subsection (j)(3)," which is the new designation for that subsection. (*See* section 1342(a)(5)(A) of the Omnibus Trade Act.)

(4) Paragraph (b) of § 210.58 of the Commission's rules formerly provided that the ALJ could make findings in the temporary relief ID pertaining to the public interest but he could not compel

discovery solely to obtain information relating to the public interest. In light of the provisions of interim § 210.24(e), which now authorize ALJs to compel discovery and make findings on remedy, the public interest, and bonding issues when adjudicating motions for temporary relief, a reference to paragraphs (e)(12), (13), and (17) of interim § 210.24 have been added to paragraph (b) of § 210.58 for intra-Part consistency and to prevent confusion.[26]

Section 210.59

Former § 210.59, (entitled "Period for concluding investigation") previously discussed the following matters: (1) The 12-month and 18-month statutory deadlines for completing ordinary and "more complicated" investigations; (2) the grounds and procedure for designating an investigation "more complicated"; and (3) the exclusion of any time during which an investigation was suspended, in computing the statutory deadline for completion of the investigation.

Section 210.59 has been revised in the following manner:

(1) The previous text of § 210.59 has been incorporated into a new paragraph (a).

(2) To be consistent with the provisions of interim § 210.24(e), a new paragraph (b) has been added to § 210.59 to provide for the designation of an investigation as "more complicated" solely for the purpose of obtaining more time to adjudicate a motion for temporary relief.

(3) The other revisions to § 210.59 pertain to "complicated" (as opposed to "more complicated") investigations. Section 1342(d)(2) of the Omnibus Trade Act provides that any investigation under section 337 of the Tariff Act that is due to be completed within 180 days after enactment of the Omnibus Trade Act can be declared "complicated," and the 12-month or 18-month statutory deadline can be extended for up to an additional 90 days. New provisions for "complicated" investigations have been added to § 210.59 of the Commission's rules as paragraph (c). The first part of paragraph (c) corresponds to the language of the new legislation, which provides for "complicated" designations. The second half of paragraph (c) provides a general definition of a "complicated" investigation and also provides that the ID/discretionary review procedure is to be used to obtain that designation. The appropriateness of ordering the "complicated" designation and the length of the resulting extension of time will depend on the facts and circumstances in each case.

Sections 210.60 and 210.61

The new legislation did not necessitate revision of these sections; the interim provisions are the same as the former provisions.[27]

Section 210.70

Section 210.70 governs interlocutory appeals to the Commission of actions taken by the ALJ. The preexisting provisions of this rule have been retained, but the Commission has added the phrase "except as provided in § 210.24(e)(15)" to be consistent with the new interim provisions of that section, which expressly disallow such appeals in connection with motions for temporary relief because of the stringent statutory deadlines for determining whether to grant such motions.

Section 210.71

Section 210.71 sets out the statutory right to judicial review of Commission determinations under section 337. The new legislation resulted in a technical amendment in the previous statutory provisions governing such review—*i.e.*, the reference to judicial review of a Commission determination "under subsection (d), (e), or (f) of section 337" was changed to "subsection (d), (e), (f) or (g) of section 337." (*See* section 1342(b)(2)(A) of the Omnibus Trade Act.) A corresponding revision has been made in § 210.71.

Explanation of the Interim Revisions to 19 CFR Part 211

Section 211.01

The new legislation did not necessitate revision of this section. The interim provisions are the same as the former provisions, except that the reference to "section 337" has been changed to "section 337 of the Tariff Act of 1930."

Section 211.10

Paragraphs (a) and (b) of this section were revised to correct an erroneous cross-reference to former § 210.14 which no longer exists. The references to that section have been changed to "§ 210.58(a)(1)". In addition, the reference to "section 337" in paragraph (a) of § 211.10 has been changed to "section 337 of the Tariff Act of 1930."

Section 211.20

The new legislation did not necessitate revision of this section. The interim provisions are the same as the former provisions, except for minor editorial changes.

Section 211.21

Section 211.21 pertains to settlement by consent. Paragraph (b) of this section has been revised in the same fashion as § 210.51 of Part 210—*i.e.*, the Commission has added a citation to the new statutory provision authorizing terminations on the basis of consent orders without a determination of whether section 337 has been violated. In addition, the citation to §§ 210.54 through 210.56 in paragraph (b) of § 211.21 has been corrected to refer to interim §§ 210.53 through 210.56.

Section 211.22

The new legislation did not necessitate revision of this section. The interim provisions are the same as the former provisions, except that the previous references to "section 337" have been changed to "section 337 of the Tariff Act of 1930" where appropriate.

Section 211.50

The new legislation did not necessitate revision of this section. The interim provisions are the same as the former provisions, except that the previous references to "section 337" have been changed to "section 337 of the Tariff Act of 1930" where appropriate.

Section 211.51

The new legislation did not necessitate revision of this section. The interim provisions are the same as the former provisions, except that the first sentence of paragraph (a) has been revised to correct a typographical error.

Section 211.52

Section 211.52 pertains to the handling and treatment of confidential information submitted to the Commission pursuant to a final Commission action. This rule has been revised to be consistent with the new legislative provisions concerning the handling of confidential information in section 337 proceedings and with other Commission rules pertaining to the same subject treatment. The revisions primarily consist of cross-references to the other applicable rules.

Section 211.53

The new legislation did not necessitate revision of these sections. The interim provisions are the same as the former provisions, except that

[26] Because the temporary relief provisions of the new legislation provide for the possible posting of a temporary relief bond by the complainant as a prerequisite to obtaining such relief, the Commission may eventually revise paragraph (a) of section 210.58 further to include that issue as part of the Commission's bonding analysis. (*See supra* n.2.)

[27] But see *infra* n. 29 with respect to § 210.61.

references to the Commission's former "Unfair Import Investigations Division" and the "the Chief" of that division have been changed to "the Office of Unfair Import Investigations" (consistent with a similar reference in interim § 210.24(e)(6) and "the Director."

Section 211.54

The new legislation did not necessitate revision of this section.[28] The interim provisions are the same as the former provisions, except that the previous reference to "section 337" in paragraph (b) has been changed to "section 337 of the Tariff Act of 1930" where appropriate.

Section 211.55

The new legislation did not necessitate revision of this section. The interim provisions are the same as the former provisions, except that the previous reference in paragraph (b) to "subsection (a) above" has been changed to "paragraph (a) of this section."

Sections 211.56, 211.58, and 211.59

In addition to authorizing the Commission to issue cease and desist orders in addition to an exclusion order, section 1342(a)(5)(B) of the Omnibus Trade Act amends section 337 of the Tariff Act by creating a new subsection (i), which authorizes the Commission, if certain conditions are met, to order seizure and forfeiture of articles imported in violation of section 337 and an outstanding permanent (and final) exclusion order. In cases in which such seizure and forfeiture is ordered, the Commission must notify the Secretary of the Treasury and, upon receipt of the order, the Secretary must enforce it in accordance with the procedure set forth in the statute.

The Commission determined that the most logical place to insert interim Commission rules providing for the issuance of seizure and forfeiture orders is in Subpart C of Part 211. Subpart C of Part 211 governs, inter alia, enforcement of Commission exclusion orders, cease and desist orders, and consent orders. Section 211.56(c) in that subpart provides for (1) formal Commission enforcement proceedings, (2) the resulting modification or revocation of the order in question to prevent unfair practices, and (3) the initiation of civil actions for civil penalties or injunctive relief. Since the new seizure and forfeiture provisions of section 337 will be an additional means of enforcing Commission exclusion orders, the seizure and forfeiture provisions have been implemented on an interim basis by adding a new paragraph (c)(5) to § 211.56. The new paragraph (c)(5) of § 211.56 corresponds to the seizure and forefeiture provisions of the new legislation. Section 211.56 also has been revised in the following manner: (1) The reference in paragraph (a) to the Commission's former "Unfair Import Investigations Division" has been changed to "the Office of Unfair Import Investigations" (consistent with a similar reference in interim §§ 210.24(e)(6) and 211.53); and (2) the previous references to "section 337(f)" in paragraphs (b) and (c) have been changed to "subsection (f) of section 337 of the Tariff Act of 1930."

As part of the general plan for interim implementation of the new seizure and forfeiture provisions, the Commission also has revised § 211.58 ("Temporary emergency action") to provide for the issuance of seizure and forfeiture orders on an emergency basis, pending the institution of formal Commission enforcement proceedings pursuant to § 211.56(c).

Finally, since the proposed seizure and forfeiture provisions require the Commission to notify the Secretary of the Treasury whenever a seizure and forefeiture order is issued (so that the order can be enforced), the Commission also has revised § 211.59 ("Notice of enforcement action to government agencies") to expressly provide for such notification.

Section 211.57

Section 1342(a)(6)(B) of the Omnibus Trade Act amended section 337 by adding a new subsection (k) providing for the modification or rescission of an exclusion from entry or an order issued under subsections (d), (e), (f), (g), or (i) of section 337. The new statutory provision authorizes the Commission to modify or rescind temporary and permanent remedial orders in response to a petition filed by a respondent who was previously found to be in violation of section 337, provided that such action is warranted on the basis of new evidence, or evidence that could not have been presented during the proceeding that led to the issuance of the order, or on grounds that would permit relief from a judgment or an order under the FRCP.[29]

Commission § 211.57, formerly entitled "Modification or dissolution of final Commission actions," has been revised in the following manner:

(1) To conform to language of the new statutory provisions, the word "rescission" has been substituted for "dissolution" and the word "petition" has been substituted for "motion."

(2) The former provisions regarding the filing of motions under § 211.57 and new language corresponding to the new statutory provisions pertaining to the filing of petitions for modifications or revocation by a party previously found to be in violation of section 337 have respectively become paragraphs (1) and (2) of a newly created paragraph (a) of § 211.57 entitled "Petitions for modification or rescission of final Commission actions."

(3) The remaining provisions of former § 211.57 have become paragraph (b) of that rule, which is entitled "Commission action upon receipt of a petition."

List of Subjects

19 CFR Part 210

Administrative practice and procedure, Investigations of unfair acts and unfair methods of competition in U.S. import trade.

19 CFR Part 211

Administrative practice and procedure, Enforcement.

Chapter II, Subchapter C of Title 19 of the Code of Federal Regulations is amended as follows:

1. Part 210 is revised to read as follows:

PART 210—ADJUDICATIVE PROCEDURES

Sec.

[28] But see *infra* n.29 with respect to § 211.54(b).

[29] The House and Senate reports accompanying the original House and Senate versions of the trade bill stated that this provision is intended to codify the existing Commission practice. H.R. No. 40 at 161; S. Rep. No. 71 at 133. The Commission notes, however, that the new legislation differs significantly from preexisting Commission rules under which respondents and other parties could have obtained implicit or explicit modification or rescission of a remedial order or the determination that resulted in the issuance of the order—*viz.*, former §§ 210.61, 211.57, and 211.54(b). For purposes of implementing the new statutory provisions on an interim basis, the Commission has decided simply to incorporate the statutory provisions into § 211.57. But for purposes of developing final rules to implement the new modification and rescission provisions, the Commission will assess interim §§ 210.61, 211.54(b), and 211.57(a) to determine whether to develop new or revised rules governing modification or rescission of final Commission actions. Interested persons are encouraged to comment on the issue.

Authority 19 U.S.C. 1333, 1335, and 1337.

§ 210.1 Applicability of Part.

The rules in this Part govern procedure relating to proceedings under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337). These rules are authorized by section 333, 335, and 337 of the Tariff Act of 1930 (19 U.S.C. 1333, 1335, and 1337).

§ 210.2 General policy.

It is the policy of the Commission that, to the extent practicable and consistent with requirements of law, such proceedings shall be conducted expeditiously. In the conduct of such proceedings, the administrative law judge and counsel or other representative for each party shall make every effort at each stage of the proceedings to avoid delay.

Subpart A—General Provisions

§ 210.4 Definitions.

As used in this part—

"Administrative law judge" means the person appointed under section 3105 of Title 5 of the United States Code presiding over the taking of evidence in an investigation under this Part;

"Commission investigative attorney" means, for purposes of a particular proceeding under section 337 of the Tariff Act, the attorney(s) designated to engage in investigatory activities with respect to the proceeding, in his (or their) capacity as investigator(s) in the proceeding;

"Complainant" means a person who has filed a complaint with the Commission under this part;

"Party" means each complainant and respondent in the investigation, the Commission investigative attorney, and each person permitted to intervene pursuant to § 210.26;

"Respondent" means any person named in a notice of investigation issued under this Part as allegedly violating section 337 of the Tariff Act.

§ 210.5 Written submissions

(a) *Caption; names of parties.* Every submission shall contain a caption setting forth the name of the Commission, the title of the investigation, the docket number or investigation number assigned to the proceeding, if any, and, in the case of a complaint and response, the names of all or the primary parties to the proceeding.

(b) *Signing of pleadings, motions, and other papers; sanctions.* Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign or his duly authorized officer or agent shall sign the party's pleading, motion, or other paper, and shall state the party's address. Except when otherwise provided in §§ 210.20(a), 210.21, and 210.24(e) (1) and (9), pleadings, motions, and other papers need not be under oath or accompanied by an affidavit. The signature of an attorney or party, or the party's duly authorized officer or agent constitutes certification by the signer that:

(1) He is duly authorized to sign the pleading, motion, or other paper;

(2) He has read the document;

(3) To the best of the signer's knowledge, information, and belief founded after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and

(4) The document is not being filed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this section, the Commission or (if the case is before the administrative law judge) the administrative law judge, upon motion or sua sponte, shall impose upon the person who signed the document, the represented party, or both, an appropriate sanction.

(c) *Filing of documents.* Submissions shall be filed in accordance with paragraphs (a), (b), and (c) of this section and § 210.8 of this chapter. Except as otherwise provided for in this Part or by the Commission, the original and fourteen (14) true copies of each submission shall be filed with the Commission. While an investigation is before an administrative law judge, the original and six (6) true copies of each submission shall be filed with the Commission Secretary.

(d) *Service of submissions.* Except as otherwise provided for in this part, or by the Commission or the administrative law judge, each submission filed by a party with the Commission shall be served on all other parties and in a manner provided for in § 210.16 of this chapter.

§ 210.6 Confidential business information

(a) *Confidential business information defined and identified.* Confidential business information shall be defined in accordance with § 210.6(a) of this chapter and shall be identified and submitted in accordance with § 210.6(c) of this chapter.

(b) *Restrictions on disclosure.* Information that is submitted to the Commission or exchanged among the parties in connection with proceedings under this part, is designated confidential by the person submitting it (pursuant to paragraph (a) of this section), and is in fact confidential within the meaning of § 210.6(a) of this chapter, may not be disclosed without the consent of the person submitting it to anyone but the following persons:

(1) Persons who are granted access to confidential information under orders issued pursuant to § 210.37(a) or § 210.44;

(2) An officer or employee of the Commission who is directly concerned with carrying out the investigation in connection with which the information is submitted;

(3) An officer or employee of the United States Government who is directly involved in a review conducted pursuant to section 337(j) of the Tariff Act of 1930; or

(4) An officer or employee of the United States Customs Service who is directly involved in administering an exclusion from entry under section 337(d) or 337(g) of the Tariff Act or an entry under bond under section 337(e) of the Tariff Act resulting from the investigation in connection with which the information was submitted.

§ 210.7 Computation of time, additional hearings, postponements, continuances, and extensions of time.

Unless otherwise ordered by the Commission or the administrative law judge and except as provided in § 210.24(e) (2), (7), and (17), the computation of time, the granting of additional hearings, postponements, continuances, and extensions of time shall be in accordance with § 201.14 of this chapter.

§ 210.8 Service of process and other documents.

Unless otherwise ordered by the Commission or the administrative law judge and except as provided in § 210.24(e) (4), (7), and (17), the service or process and other documents shall be in accordance with § 201.16 of this chapter.

Subpart B—Commencement of Proceedings

§ 210.10 Commencement of proceedings.

(a) *Upon receipt of complaint.* A proceeding is commenced by filing with the Secretary of the Commission the original and fourteen (14) true copies of a complaint, plus one copy for each person named in the complaint as violating section 337 of the Tariff Act and one (1) copy for the government of each foreign country of any person or persons so named. If the complainant is seeking temporary relief, one (1) additional copy of the motion for such relief also must be filed for each proposed respondent and for the government of the foreign country of the proposed respondent. The additional copies of the complaint and motion for temporary relief for each proposed respondent and the appropriate foreign government are to be provided notwithstanding the provisions of § 210.24(e)(4) that require service of the complaint and motion for temporary relief by the complainant.

(b) *Upon the initiative of the Commission.* The Commission may upon its initiative commence proceedings based upon any alleged violation of section 337 of the Tariff Act.

§ 210.11 Action of Commission upon receipt of complaint.

Upon receipt of a complaint filed pursuant to § 201.8 of this chapter and §§ 210.5, 210.10, and 210.20, the Commission shall take the following actions:

(a) *Examination of complaint.* The Commission shall examine the complaint for sufficiency and compliance with the applicable rules of this chapter.

(b) *Informal investigatory activity.* The Commission shall identify sources of relevant information, assure itself of the availability thereof, and, if deemed necessary, prepare subpoenas therefore, and give attention to other preliminary matters.

§ 210.12 Institution of investigation.

Except as provided in § 210.24(e) (2), (7), and (8), within thirty (30) days after receipt of a complaint or, in exceptional circumstances, as soon after such period as possible, the Commission shall determine whether the complaint is properly filed and, if so, shall vote on whether to institute an investigation. The complaint may be withdrawn as a matter of right before the Commission votes on whether to institute an investigation. The investigation shall be instituted by notice published in the **Federal Register**. Such notice will define the scope of the investigation. If the Commission determines not to institute an investigation, the complaint shall be dismissed and the Commission shall notify the complainant and all proposed respondents in writing of the Commission's action and the reason(s) therefor.

§ 210.13 Service of complaint and notice of investigation by the Commission.

Notwithstanding the provisions of § 210.24(e)(4) requiring service of the complaint by the complainant, the Commission, upon institution of an investigation, shall serve copies of the complaint and the notice of investigation (and any accompanying motion for temporary relief) upon the following:

(a) Each respondent;

(b) The Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and such other agencies and Departments as the Commission considers appropriate; and

(c) The embassy in Washington, DC of the government of each foreign country represented by each respondent.

All respondents named after an investigation has been instituted and the governments of the foreign countries they represent shall be served as soon as possible after the respondents are named.

Subpart C—Pleadings and Motions

§ 210.20 The complaint.

(a) Contents of the complaint. In addition to conforming with the requirements of § 201.8 of this chapter and § 210.5 (a), (b), and (c), the complaint shall—

(1) Be under oath and signed by the complainant or his duly authorized officer, attorney, or agent, with the name, address, and telephone number of the complainant and any such officer, attorney, or agent given on the first page of the complaint;

(2) Include a statement of the facts constituting the alleged unfair methods of competition and unfair acts;

(3) Describe specific instances of alleged unlawful importations or sales; for importations occurring prior to January 1, 1989, include the Tariff Schedules of the United States item number under which the article was imported; for importations occurring on or after January 1, 1989, include the Harmonized Tariff Schedule of the United States item number under which the article was imported;

(4) State the name, address, and nature of the business (when such nature is known) of each person alleged to be violating section 337 of the Tariff Act;

(5) Include a statement as to whether or not the alleged unfair methods of competition and unfair acts, or the subject matter thereof, are or have been the subject of any court or agency

litigation, and, if so, include a brief summary of such litigation;

(6)(i) When the alleged violation of section 337 is based on an unfair method of competition or an unfair act other than infringement of a U.S. patent or a federally registered copyright, trademark, or mask work, or the importation or sale of a product made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent, and an element of the complaint is the existence of a threat or effect to destroy or substantially injure, or to prevent the establishment of, such a domestic industry, include a description of the domestic industry affected, including the relevant operations of any licensees; or

(ii) When the alleged violation of section 337 is based on an unfair method of competition or an unfair act other than infringement of a U.S. patent or a federally registered copyright, trademark, or mask work, or the importation or sale of a product made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent, and an element of the complaint is the existence of a threat or effect to restrain or monopolize trade and commerce in the United States, include a description of the trade and commerce affected; or

(iii) When the alleged violation of section 337 is based on infringement of a U.S. patent or infringement of a federally registered copyright, trademark, or mask work, or the importation or sale of a product made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent, include a description of the relevant domestic industry as defined in section 337(a)(3), including the relevant operations of any licensees. Relevant information includes but is not limited to:

(A) Significant investment in plant and equipment;

(B) Significant employment of labor or capital; or

(C) Substantial investment in the exploitation of the subject patent, copyright, trademark, or mask work, including engineering, research and development, or licensing;

(7) Include a description of the complainant's business and its interests in the relevant domestic industry or in the trade and commerce allegedly affected. For every intellectual property based complaint (regardless of the type of intellectual property right involved), include a showing that at least one complainant is the owner or exclusive licensee of the subject property;

(8) If the alleged violation involves an unfair method of competition or an unfair act other than infringement of a patent or a registered copyright, trademark, or mask work, or the importation or sale of a product made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent, state a specific theory underlying the general allegation(s) regarding the existence of a threat or effect to destroy or substantially injure a domestic industry, to prevent the establishment of a domestic industry, or to restrain or monopolize trade and commerce in the United States. Include a statement of facts indicating the threat or effect to substantially injure. The information that should ordinarily be provided includes the volume and trend of production, sales, and inventories of the involved domestic article; a description of the facilities and number and type of workers employed in the production of the involved domestic article; profit-and-loss information covering overall operations and operations concerning the involved domestic article; pricing information with respect to the involved domestic article; when available, volume and sales of imports; and other data pertinent to the subject matter of the complaint that would support the allegation that—

(i) The threat or effect of the importations or sales in question is to destroy or substantially injure an industry in the United States; or

(ii) The threat or effect of the importations or sales in question is to prevent the establishment of an industry in the United States; or

(iii) The threat or effect of the importations or sales in question is to restrain or monopolize trade and commerce in the United States;

(9) Include, when a complaint is based upon the infringement of a valid and enforceable U.S. patent or the importation or sale of a product allegedly made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable U.S. patent—

(i) The identification of each U.S. letters patent and a certified copy thereof (a legible copy of each such patent will suffice for each required copy of the complaint);

(ii) The identification of the ownership of each involved U.S. letters patent and a certified copy of each assignment of each such patent (a legible copy thereof will suffice for each required copy of the complaint);

(iii) The identification of each licensee under each involved U.S. letters patent;

(iv) When known, a list of each foreign patent, each foreign patent application (not already issued as a patent), and each foreign patent application that has been denied corresponding to each involved U.S. letters patent, with an indication of the prosecution status of each such foreign patent application;

(v) A nontechnical description of the invention of each involved U.S. letters patent;

(vi) A reference to the specific claims in each involved U.S. letters patent that allegedly cover the article imported or sold by each person named as violating section 337 of the Tariff Act, or the process under which such article was produced;

(vii) A showing of any domestic production of the involved article or of any domestic utilization of the involved process allegedly covered by the above specific claims of each involved U.S. letters patent, and a showing that each person named as violating section 337 of the Tariff Act is importing and/or selling the article covered by, or produced under the involved process covered by, the above specific claims of each involved U.S. letters patent. The complainant shall make such showing by appropriate allegations, and when practicable, by a chart that applies an exemplary claim of each involved U.S. letters patent to a representative involved domestic article or process and to a representative involved article of each person named as violating section 337 of the Tariff Act or to the process under which such article was produced; and

(viii) Drawings, photographs, or other visual representations of both the involved domestic article or process and the involved article of each person named as violating section 337 of the Tariff Act, or of the process utilized in producing such article, and, when a chart is furnished under paragraph (a)(9)(vii) of this section, the parts of such drawings, photographs, or other visual representations should be labeled so that they can be read in conjunction with such chart; and

(10) *Contain a request for relief sought.* When the complaint contains a request for temporary relief pursuant to subsections (e) or (f) of section 337 of the Tariff Act, a separate motion for temporary relief shall accompany the complaint in accordance with § 210.24(e).

(b) *Submissions of articles as exhibits.* At the time the complaint is filed, when practical and possible, the

involved articles shall be submitted as exhibits—both the involved domestic article and that of each person named as violating section 337 of the Tariff Act.

(c) *Additional material to accompany each patent-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by, or produced under a process covered by, the claims of a valid U.S. letters patent the following:

(1) Three (3) copies of each license agreement arising out of each involved U.S. letters patent, except that, to the extent that a standard license agreement is used, three (3) copies of the standard license agreement and a list of the licensees operating under such agreement will suffice;

(2) One (1) certified copy of the Patent and Trademark Office file wrapper for each involved U.S. letters patent, plus three (3) additional copies thereof; and

(3) Four (4) copies of each patent and applicable pages of each technical reference mentioned in the file wrapper of each involved U.S. letters patent.

(d) *Additional material to accompany each registered trademark-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by a federally registered trademark one (1) certified copy of the trademark registration.

(e) *Additional material to accompany each complaint based on a nonfederally registered trademark.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by a nonfederally registered trademark the following:

(1) Information concerning prior attempts to register the alleged trademark; and

(2) Information on the status of current attempts to register the alleged trademark.

(f) *Additional material to accompany each copyright-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by a copyright one (1) certified copy of the copyright registration.

(g) *Additional material to accompany each registered mask work-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of a semiconductor chip in a manner that constitutes infringement of a federally registered mask work, one (1) certified copy of the mask work registration.

§ 210.21 The response.

(a) *Time for response.* Except as provided in § 210.24(e)(9) and unless otherwise ordered in the notice of investigation or by the administrative law judge, respondents shall have twenty (20) days from the date of service of the complaint and notice of investigation by the Commission under § 210.13 within which to file a written response to the complaint and the notice of investigation. When the investigation involves a motion for temporary relief under § 210.24(e), the response to the complaint and notice of investigation must be filed concurrently with the response to the motion for temporary relief—*i.e.*, ten (10) days after service of the complaint, notice of investigation, and the motion for temporary relief by the Commission pursuant to § 210.13. (*See* § 210.24(e)(9).)

(b) *Contents of the response.* In addition to conforming to the requirements of § 201.8 of this chapter and § 210.5, each response shall be under oath and signed by respondent or his duly authorized officer, attorney, or agent with the name, address, and telephone number of the respondent and any such officer, attorney, or agent given on the first page of the response. Each respondent shall respond to each allegation in the complaint and in the notice of investigation, and shall set forth a concise statement of the facts constituting each ground of defense. There shall be a specific admission, denial, or explanation of each fact alleged in the complaint and notice, or if the respondent is without knowledge of any such fact, a statement to that effect. Allegations of a complaint and notice not thus answered may be deemed to have been admitted. Each response shall include, when available, statistical data on the quantity and value of imports of the involved article in addition to a statement concerning the respondent's capacity to produce the subject article and the relative significance of the United States market to its operations. Affirmative defenses shall be pleaded with as much specificity as possible in the response. When the alleged unfair methods of competition and unfair acts are based upon the claims of a valid U.S. letters patent, the respondent is encouraged to make the following showing when appropriate:

(1) If it is asserted in defense that the article imported or sold by respondent is not covered by, or produced under a process covered by, the claims of each involved U.S. letters patent, a showing of such noncoverage for each involved claim in each U.S. letters patent in question shall be made, which showing may be made by appropriate allegations and, when practicable, by a chart that applies the involved claims of each U.S. letters patent in question to a representative involved imported article of respondent or to the process under which such article was produced;

(2) Drawings, photographs, or other visual representations of the involved imported article of respondent or the process utilized in producing such article, and, when a chart is furnished under paragraph (b)(1) of this section, the parts of such drawings, photographs, or other visual representations should be labeled so that they can be read in conjunction with such chart; and

(3) If the claims of any involved U.S. letters patent are asserted to be invalid or unenforceable, the basis for such assertion, including, when prior art is relied on, a showing of how the prior art renders each claim invalid or unenforceable and a copy of such prior art.

(c) Submission of article as exhibit. At the time the response is filed, when practical and possible, the involved imported article shall be submitted as an exhibit.

§ 210.22 Amendments to pleadings and notice of investigation.

(a) Amendment of complaint. The complaint may be amended at any time prior to the institution of the investigation. After institution, the complaint may be amended for good cause shown upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to the investigation by a change in the scope of the investigation that results from such amendment.

(b) By leave. If and whenever disposition of the issues in an investigation on the merits will be facilitated, the administrative law judge, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to an investigation, may allow appropriate amendments to pleadings. Provided, however, that a motion for amendment of a complaint after the institution of an investigation shall be made to the administrative law judge, who shall grant the motion by filing with the Commission an initial determination, or shall deny the motion by issuing an order directing denial; the motion shall be decided according to the standards of paragraph (a) of this section. A motion for amendment of a notice shall be dealt with as provided with respect to motions for amendment of a complaint.

(c) Conformance to evidence. When issues not raised by the pleadings or notice of investigation, but reasonably within the scope of the pleadings and notice, are considered during the taking of evidence by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings and notice. Such amendments of the pleadings and notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time, and shall be effective with respect to all parties who have expressly or impliedly consented.

§ 210.23 Supplemental submissions.

The administrative law judge may, upon reasonable notice and such terms as are just, permit service of a supplemental submission setting forth transactions, occurrences, or events that have taken place since the date of the submission sought to be supplemented and that are relevant to any of the issues involved.

§ 210.24 Motions.

(a) Presentations and disposition. (1) During the period between the institution of an investigation and the assignment of the investigation to a presiding administrative law judge, all motions shall be addressed to the Chief Administrative Law Judge. During the time an investigation is before an administrative law judge, all motions therein shall be addressed to the administrative law judge.

(2) When an investigation is before the Commission, all motions shall be addressed to the Chairman of the Commission. A motion to amend the complaint and notice of investigation to name an additional respondent after institution shall be served on the proposed respondent. All written motions shall be filed with the Commission Secretary and served upon each party.

(b) Content. All written motions shall state the particular order, ruling, or action desired and the grounds therefor.

(c) Responses to motions. Within ten (10) days after service of any written motions, or within such longer or shorter time as may be designated by the administrative law judge or the Commission, a nonmoving party, or in the instance of a motion to amend the complaint or notice of investigation to name an additional respondent after institution, the proposed respondent, shall respond or he may be deemed to have consented to the granting of the relief asked for in the motion. The moving party shall have no right to reply except as permitted by the administrative law judge or the Commission.

(d) Motions for extensions. As a matter of discretion, the administrative law judge or the Commission may waive the requirements of this section as to motions for extension of time, and may rule upon such motions ex parte.

(e) Motions for temporary relief. Requests for temporary relief pursuant to subsection (e) or (f) of section 337 of the Tariff Act shall be made through a motion to be filed and adjudicated in accordance with the following provisions.

(1) *Motion accompanying complaint.* (i) A complaint requesting temporary relief pursuant to § 210.20(a)(10) shall be accompanied by a motion that sets forth complainant's request for temporary relief. The motion must contain a detailed statement of specific facts bearing on:

(A) Complainant's probability of success on the merits;

(B) Immediate and substantial harm to the domestic industry in the absence of the requested temporary relief;

(C) Harm, if any, to the proposed respondents if the requested temporary relief is granted; and

(D) The effect, if any, that the issuance of the requested temporary relief would have on the public interest.

(ii) The following documents and information shall be filed along with the motion:

(A) A memorandum of points and authorities in support of the motion;

(B) Affidavits executed by persons with knowledge of the facts specified in the motion; and

(C) All documentary information and other evidence in complainant's possession that complainant intends to submit in support of the motion.

If the complaint and/or the motion for temporary relief contains confidential business information as defined in § 201.6(a), the complainant must follow the procedure outlined in § 210.6(a), § 201.6 (a) and (c), and paragraph (e)(5) of this section.

(2) *Motions filed after the complaint.* A motion for temporary relief may be filed after the complaint, but must be filed prior to the Commission determination under § 210.12 on whether to institute an investigation. A motion filed after the complaint shall contain the information, documents, and evidence described in paragraph (e)(1) of this section, and must also make a showing that extraordinary circumstances exist that warrant temporary relief and that the moving party was not aware, and with due diligence could not have been aware, of those circumstances at the time the complaint was filed. When a motion for temporary relief is filed after the complaint but before the Commission has determined whether to institute an investigation based on the complaint, the 35-day period allotted for review of the complaint and informal investigative activity pursuant to paragraph (e)(8) of this section will begin to run anew from the date on which the motion was filed.

(3) Motions after institution of an investigation. A motion for temporary relief may not be filed after an investigation has been instituted.

(4) Service of the motion by complainant. Notwithstanding the provisions of § 210.13 regarding service of the complaint and motion for temporary relief by the Commission upon institution of an investigation, on the day the complainant files a complaint and motion for temporary relief with the Commission (*see* § 201.8(a)), the complainant must serve nonconfidential copies of both documents (as well as nonconfidential copies of all materials or documents attached thereto) on all proposed respondents and on the embassy in Washington, DC of the government of the country(s) that the proposed respondents represent. The complaint and motion shall be served by the fastest means available. A signed certificate of service must accompany the complaint and motion for temporary relief. If the certificate does not accompany the complaint and the motion, the Secretary shall not accept the complaint or the motion and shall promptly notify the submitter. Actual proof of service (or proof of a serious effort to make service)—*e.g.*, certified mail return receipts, courier or overnight delivery receipts, or other proof of delivery—need not be filed with the complaint and motion, but should be retained by the complainant in the event that the complainant is requested to provide actual proof of service.

(5) Content of the service copies. Any purportedly confidential business information that is deleted from the nonconfidential service copies of the complaint and motion for temporary relief must satisfy the requirements of § 201.6(a) (which defines confidential information for purposes of Commission proceedings). For attachments that are confidential in their entirety, complainant must provide a nonconfidential summary of what the document contains. Despite the redaction of confidential material from the motion for temporary relief and the complaint, the nonconfidential service copies must contain enough factual

information about each element of the violation alleged in the complaint and the motion to enable each proposed respondent to comprehend the allegations against it.

(6) Notice accompanying the service copies. Each service copy of the complaint and motion for temporary relief shall be accompanied by a notice containing the following text:

Notice is hereby given that the attached complaint and motion for temporary relief will be filed with the U.S. International Trade Commission in Washington, DC on , 19 . However, the filing of the complaint and motion will not institute an investigation on that date, nor will it begin the period for filing responses to the complaint and motion pursuant to 19 CFR 210.21 and 210.24(e)(9).

Upon receipt of the complaint, the Commission will examine the complaint for sufficiency and compliance with 19 CFR 201.8, 210.5, 210.10, and 210.20. The Commission's Office of Unfair Import Investigations will conduct information investigative activity pursuant to 19 CFR 210.11 to identify sources of relevant information and to assure itself of the availability thereof. The motion for temporary relief will be examined for sufficiency and compliance with 19 CFR 201.8, 210.5, and 210.24(e) (1), (4), (5), (6), and will be subject to the same type of preliminary investigative activity as the complaint.

Within thirty-five (35) days after receiving the complaint and motion for temporary relief in accordance with 19 CFR 210.24(e) (1), or within thirty-five (35) days after filing of the motion for temporary relief (if it is filed after the complaint pursuant to 19 CFR 210.24(e)(2)), the Commission will determine whether to institute an investigation on the basis of the complaint and whether to refer the motion for temporary relief to a Commission administrative law judge for issuance of an initial determination in accordance with 19 CFR 210.24(e) (10) and (17). *See* 19 CFR 210.12 and 210.24(e) (1) and (8).

If the Commission determines to conduct an investigation of the complaint and the motion for temporary relief, the investigation will be formally instituted on the date on which the Commission publishes a notice of investigation in the Federal Register pursuant to 19 CFR 210.12. If an investigation is instituted, copies of the complaint, the notice of investigation, the motion for temporary relief, and the Commission's rules of Practice and Procedure (19 CFR Parts 210 and 211) will be served on each respondent by the Commission pursuant to 19 CFR 210.13. Responses to the complaint, the notice of investigation, and the motion for temporary relief must be filed within ten (10) days after Commission service thereof, in accordance with 19 CFR 201.8, 210.5, 210.21, and 210.24(e)(9). *See also* 19 CFR 201.14 and 210.7 regarding computation of the 10-day response period.

If, after reviewing the complaint and motion for temporary relief, the Commission determines not to institute an investigation, the complaint and motion will be dismissed and the Commission will notify the complainant and all proposed respondents in writing of the Commission's decision and the reason(s) therefor, pursuant to 19 CFR 210.12.

For information concerning the filing of the complaint and its treatment and to ask general questions concerning section 337 practice and procedure, contact the Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Room 401, Washington, DC 20436, telephone 202–252–1560. Such inquiries will be referred to the Commission investigative attorney assigned to the complaint. (*See also* the Commission's rules of practice and procedure set forth in 19 CFR Parts 210 and 211.)

To learn the date on which the Commission will vote on whether to institute an investigation and the publication date of the notice of investigation (if the Commission decides to institute an investigation), contact the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–252–1000.

This notice is being provided pursuant to 19 CFR 210.24(e)(6).

(7) *Amendment of the motion.* A motion for temporary relief may be amended at any time prior to the institution of an investigation. However, all material filed to amend the motion (or the complaint) must be served on all proposed respondents and on the embassies in Washington, DC, of the foreign governments that they represent, in accordance with paragraph (e)(4) of this section. If the amendment expands the scope of the motion, the 35-day period allotted under paragraph (e)(8) of this section for determining whether to institute an investigation and to initiate temporary relief proceedings shall begin to run anew from the date the amendment is filed with the Commission. Motions for temporary relief may not be amended after an investigation is instituted.

(8) *Provisional acceptance of the motion.* The Commission shall determine whether to accept a motion for temporary relief at the same time it determines whether to institute an investigation on the basis of the complaint. That determination shall be made within thirty-five (35) days after the complaint and motion for temporary relief are filed. Before the Commission determines whether to provisionally accept a motion for temporary relief, the motion will be examined for sufficiency and compliance with paragraphs (e) (1), (4), (5), and (6) of this section and §§ 201.8, 210.5 of this chapter, and will be subject to the same type of preliminary investigative activity as the complaint (see § 210.11(b)). Acceptance of a motion pursuant to this paragraph constitutes provisional acceptance for referral of the motion to an administrative law judge for an initial determination pursuant to paragraph (e)(17) of this section. Commission rejection of an insufficient or improperly filed complaint will preclude acceptance of a motion for temporary relief. However, Commission rejection of a motion for temporary relief will not preclude institution of an investigation of the complaint.

(9) *Responses to the motion and the complaint.* Any party may file a response to a motion for temporary relief. Responses shall be filed within ten (10) days after service of the motion by the Commission upon institution of an investigation, unless otherwise ordered by the administrative law judge. The response must comply with the requirements of § 201.8 of this chapter and § 210.5, and shall contain the following information:

(i) A statement that sets forth with particularity any objection to the motion for temporary relief;

(ii) A statement that sets forth with specificity facts bearing on:

(A) Complainant's probability of success on the merits;

(B) Immediate and substantial harm, if any, to the domestic industry in the absence of the requested temporary relief;

(C) Harm, if any, to the proposed respondents if the requested temporary relief is granted; and

(D) The effect, if any, that issuance of the requested temporary relief would have on the public interest;

(iii) a memorandum of points and authorities in opposition to the motion;

(iv) affidavits, where possible, executed by persons with knowledge of the facts specified in the response.

Each response to the motion for temporary relief must also be accompanied by a response to the complaint and notice of investigation. Responses to the complaint and notice of investigation must comply with § 201.8 of this chapter and §§ 210.5 and 201.21.

(10) *Referral to an administrative law judge.* Following provisional Commission acceptance of a motion for temporary relief and upon institution of an investigation, the motion for temporary relief shall be forwarded to an administrative law judge for an initial determination on whether there is reason to believe there is a violation of section 337 of the Tariff Act and whether temporary relief is appropriate.

(11) *Designating an investigation "more complicated" for the purpose of adjudicating a motion for temporary relief.* At the time the Commission

determines to institute an investigation and provisionally accepts a motion for temporary relief pursuant to paragraph (e)(8) of this section, the Commission may designate the investigation "more complicated" pursuant to § 210.59(b) for the purpose of obtaining additional time to adjudicate the motion for temporary relief. In the alternative, after the motion for temporary relief is referred to the administrative law judge for an initial determination under paragraphs (e)(10) and (17) of this section, the administrative law judge may issue an order, sua sponte or on motion, designating the investigation "more complicated" for purpose of obtaining additional time to adjudicate the motion for temporary relief. Such order shall constitute a final determination of the Commission, and notice of the order shall be published in the **Federal Register.**

(12) *Discovery and compulsory process.* The administrative law judge shall place such limits upon the kind or amount of discovery to be had or the period of time during which discovery may be carried out as shall be consistent with the time limitation set forth in paragraph (e)(17) of this section relating to issuance of an initial determination concerning the motion for temporary relief. The administrative law judge's authority to compel discovery includes discovery relating to the following issues:

(i) The effect, if any, that issuance of the relief requested in the motion would have on the public interest;

(ii) The form of temporary relief the Commission should issue if it determines to grant temporary relief;

(iii) Whether the public interest factors enumerated in the statute preclude that form of relief; and

(iv) The amount of the bond under which the respondent(s)'s merchandise will be permitted to enter the United States during the pendency of any temporary relief order issued by the Commission.

As part of the standard analysis for determining whether to grant a motion for temporary relief (see paragraphs (e)(1) and (9) of this section), the administrative law judge should make findings on the issue specified in paragraph (e)(12)(i) of this section. The administrative law judge may, but is not required, to make findings on issues specified in paragraphs (e)(12) (ii), (iii), and (iv) of this section. Evidence and information obtained through discovery on those issues will be used by the parties and considered by the Commission in the context of the parties' written submissions on remedy, the public interest, and bonding to be filed with the Commission pursuant to paragraph (e)(18) of this section.

(13) *Evidentiary hearing.* A motion for temporary relief may be ruled upon without a hearing by the administrative law judge when a motion for summary determination under § 210.50(a) is granted in favor of respondents or other parties opposing the motion for temporary relief, or if the administrative law judge determines that the motion should be dismissed for some other reason (*e.g.*, failure to comply with some portion of paragraph (e)(1) of this section). (Such rulings by the administrative law judge shall be in the form of an initial determination issued under paragraph (e)(17) of this section.) If a hearing is conducted, the precise form and scope of the hearing are left to the discretion of the administrative law judge. At the hearing or as directed by the administrative law judge, the parties shall address the issues of whether there is reason to believe that there is a violation of section 337 of the Tariff Act and whether temporary relief is appropriate. The administrative law judge may, but is not required, to take evidence at the hearing concerning the remedy, public interest, and bonding issues specified in paragraphs (e)(12) (ii), (iii), and (iv) of this section. However, as part of the standard analysis for determining whether to grant or deny a motion for temporary relief (see paragraphs (e)(1) and (9) of this section), the ALJ should take evidence on the question of what effect the form of relief requested in the motion would have on the public interest.

(14) *Proposed findings and conclusions and briefs.* The administrative law judge shall determine whether and, if so, to what extent the parties shall be permitted to file proposed findings of fact, proposed conclusions of law, and/or briefs (pursuant to § 210.52) concerning the grant or denial of temporary relief.

(15) *Interlocutory appeals and review by the Commission.* There will be no interlocutory appeals to the Commission (pursuant to § 210.71) of the administrative law judge's ruling on any matter delegated to him or her for decision under paragraph (e) of this section. After the administrative law judge has certified to the Commission pursuant to paragraphs (e) (16) and (17) of this section an initial determination granting or denying a motion for temporary relief and the administrative record upon which the initial determination is based, the Commission's review of the administrative law judge's actions and rulings relating to the motion for temporary relief is limited to the issues specified in paragraph (e) (17) of this section.

(16) *Certification of the record.* At the close of the reception of evidence in any hearing held pursuant to paragraph (e)(13) of this section or as soon as possible thereafter, the administrative law judge shall certify the record to the Commission prior to issuance of the initial determination concerning temporary relief. However, if such advance certification is not feasible, the record shall be certified to the Commission when the administrative law judge issues the initial determination concerning the grant or denial of temporary relief, in accordance with paragraph (e)(17) of this section.

(17) *Initial determination concerning temporary relief and Commission action thereon.*

(i) On the 70th day after publication of the notice of investigation in an ordinary investigation, or on the 120th day after such publication in a "more complicated" investigation, the administrative law judge will issue an initial determination concerning temporary relief—*i.e.*, whether there is reason to believe that respondents have violated section 337 of the Tariff Act and, if so, whether temporary relief should be issued. The initial determination may, but is not required, to address the remedy, public interest, and bonding issues specified in paragraphs (e)(12) (ii), (iii), and (iv) of this section. However, as part of the standard analysis for determining whether to grant or deny a motion for temporary relief (see paragraphs (e) (1) and (9) of this section), the initial determination shall address the question for what effect the form of relief requested in the motion would have on the public interest (except when the initial determination is granting a summary determination denying the motion for temporary relief pursuant to paragraph (e)(13) of this section).

(ii) The initial determination will become the Commission's determination twenty (20) calendar days after issuance thereof in an ordinary case, and thirty (30) calendar days after issuance in a "more complicated" investigation unless the Commission modifies or vacates the initial determination within that period. Such modification or vacation may be ordered on the basis of errors of law or for policy reasons articulated by the Commission. The existence of alleged errors of fact will not be considered. In computing the aforesaid 20-day and 30-day deadlines, intermediary Saturdays, Sundays, and holidays shall be

included. However, if the last day of the period is a Saturday, Sunday, or Federal holiday as defined in § 201.14(a) of this chapter, the filing deadline shall be extended to the next business day. Because of the time constraints imposed by the statutory deadlines for determining whether to order temporary relief under section 337 of the Tariff Act, the additional time ordinarily allotted under § 210.16(d) of this chapter cannot be provided.

(iii) In order to assist the Commission to determine whether modification or revocation of the initial determination is warranted, all parties may file written comments concerning the presence (or absence) of errors of law in the initial determination and/or policy reasons that justify such action (or show that it would not be justified). Such comments will be limited to thirty (30) pages and must be filed no later than seven (7) calendar days after service of the initial determination in an ordinary case and ten (10) calendar days after service of the initial determination in a "more complicated" investigation. In computing the aforesaid 7-day and 10-day deadlines, intermediary Saturdays, Sundays, and holidays shall be included. However, if the last day of the period is a Saturday, Sunday, or Federal holiday as defined in § 201.14(a) of this Chapter, the filing deadline shall be extended to the next business day. Because of the time constraints imposed by the statutory deadlines for determining whether to order temporary relief under section 337 of the Tariff Act, the additional time ordinarily allotted under § 210.16(d) of this chapter cannot be provided.

(iv) Nonconfidential copies of the initial determination also will be served on other agencies, and they will be given ten (10) calendar days in which to file comments on the initial determination.

(v) Each party may file a response to other parties' comments within ten (10) calendar days after issuance of the initial determination in an ordinary case—and within fourteen (14) calendar days after issuance of an initial determination in a "more complicated" investigation. The reply comments will be limited to fifteen (15) pages. If the last day of the 10-day or 14-day period is a Saturday, Sunday, or Federal holiday as defined in § 201.14(a) of this chapter, the filing deadline shall be extended to the next business day. Because of the constraints imposed by the statutory deadlines, additional time ordinarily allotted under § 201.16(d) of this chapter will not be provided. The parties are expected to facilitate the filing of timely and useful responses to each other's initial comments by serving the initial comments by the fastest means available.

(vi) If the Commission determines to modify or vacate the initial determination within twenty (20) calendar days after issuance thereof in an ordinary case, or thirty (30) calendar days after issuance in a "more complicated" case, a notice and (if appropriate) a Commission opinion will be issued. If the Commission does not modify or vacate the administrative law judge's initial determination within the time provided, the initial determination will automatically become the determination of the Commission and a notice of that fact will not be issued.

(18) *Remedy, the public interest, and bonding.* The procedure for arriving at the Commission's determination of the issues of the appropriate form of temporary relief, whether the public interest factors enumerated in the statute preclude such relief, and the amount of the bond under which respondents' merchandise will be permitted to enter the United States during the pendency of any temporary relief order issued by the Commission, is as follows:

(i) While the motion for temporary relief is before the administrative law judge, he may compel discovery on matters relating to remedy, the public interest, and bonding (as provided in paragraph (e)(12) of this section). The administrative law judge also is authorized to make findings pertaining to the public interest, as provided in paragraph (e)(17) of this section. However, such findings may be superceded by Commission findings on that issue as provided in paragraph (e)(18)(iii) of this section.

(ii) On the 60th day after institution in an ordinary case or on the 105th day after institution in a "more complicated" investigation, all parties may file written submissions with the Commission addressing those issues. The submissions shall refer to information and evidence already on the record, but additional information and evidence germane to the issues of appropriate relief, the statutory public interest factors, and bonding may be provided along with the parties' submissions.

(iii) On or before the 90-day or 150-day statutory deadline for determining whether to order temporary relief under subsection (b) of section 337 of the Tariff Act, the Commission will determine what relief is appropriate in light of any violation that appears to exist, whether the public interest factors enumerated in the statute preclude the issuance of such relief, and the amount of the bond under which the respondents' merchandise will be permitted to enter the United States during the pendency of any temporary relief order issued by the Commission. In the event that Commission's findings on the public interest pursuant to paragraph (e)(18) of this section are inconsistent with findings made by the administrative law judge in the initial determination pursuant to paragraph (e)(17) of this section, the Commission's findings are controlling.

§ 210.25 Default.

(a) *Definition of default.* Failure of a respondent to take actions including but not limited to the following may be deemed to constitute a waiver of the respondent's right to appear, to be served with documents, and to contest the allegations at issue in the investigation: file a response to the complaint and notice pursuant to § 210.21 (or § 210.24(e)(9)) within the time provided, respond to a motion for summary determination, respond to a motion that materially alters the scope of the investigation, or appear at a hearing before the administrative law judge on the issue of violation of section 337 of the Tariff Act.

(b) *Procedure for determining default.* If a respondent has failed to respond or appear in the manner described in paragraph (a) of this section, the administrative law judge upon motion of his own initiative shall order such respondent to show cause why it should not be found in default. If the respondent fails to show cause why it should not be found in default, the administrative law judge may make any orders appropriate to paragraph (a) of this section.

(c) *Relief against a respondent in default.* The complainant shall declare at the time the last remaining respondent is found to be in default whether the complainant is seeking a general or limited exclusion order, or a cease and desist order, or both. In cases in which the complainant is seeking relief solely affecting the respondent found to be in default, the Commission shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion order or cease and desist order, or both, which affects only that respondent unless, after considering the effect of such order(s) upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers, the Commission finds that the order should not be issued. In cases in which the

record developed by the administrative law judge contains substantial, reliable, and probative evidence of a violation of section 337 of the Tariff Act, the Commission may issue a general exclusion order (in addition to or in lieu of cease and desist orders) regardless of the source or importer of the articles concerned, unless the public interest considerations enumerated above preclude such relief. In considering whether a prima facie case of violation of section 337 has been presented, the administrative law judge and the Commission may draw appropriate adverse inferences as provided in § 210.36 against a respondent or respondents in default with respect to those issues for which complainant has made a good faith but unsuccessful effort to obtain evidence.

§ 210.26 Intervention.

Any person desiring to intervene in an investigation under this part shall make written application in the form of a motion setting forth a sufficient basis therefore. Such application shall have attached to it a certificate showing service thereof upon each party to the investigation in accordance with the provisions of § 210.16 of this chapter. A similar certificate shall be attached to the answer filed by any party with respect to the application showing service of such answer upon the applicant and all other parties. The Commission, or the administrative law judge by initial determination, may permit the intervention of such person to such extent and upon such terms as may be deemed proper under the circumstances.

Subpart D—Discovery and Compulsory Process

§ 210.30 General provisions governing discovery.

(a) Discovery methods. The parties to an investigation may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions, interrogatories, production of documents or things for inspection and other purposes, requests for admissions, and entry upon land or other property.

(b) Scope of discovery. Unless otherwise ordered by the administrative law judge, a party may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearings if the information sought appears reasonably calculated to lend to the discovery of admissible evidence.

(c) Discovery and compulsory process. The administrative law judge shall place such limits upon the kind or amount of discovery to be had or the period of time during which discovery may be carried out as shall be consistent with the time limitations set forth in § 210.24(e)(17) relating to the issuance of initial determinations concerning motions for temporary relief or in § 210.53(a) relating to the issuance of initial determinations concerning whether there is a violation of section 337 of the Tariff Act.

(d) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty to seasonably supplement his response with respect to any question directly addressed to—

(i) The identity and location of persons having knowledge of discoverable matters; and

(ii) The identity of each person expected to be called as an expert witness at a hearing, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty to seasonably amend a prior response if he obtains information upon the basis of which—

(i) He knows that the response was incorrect when made; or

(ii) He knows that the response, though correct when made, is no longer true, and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the administrative law judge, agreement of the parties, or at any time prior to a hearing through new requests for supplementation of prior responses.

§ 210.31 Depositions.

(a) When depositions may be taken. After the date of publication in the Federal Register of the notice instituting the investigation, any party may take the testimony of any person, including a party, by deposition upon oral examination or written questions. Leave of the administrative law judge must be obtained only if the complainant seeks to take a deposition prior to the expiration of twenty (20) days after the date of service of the complainant and notice of investigation.

(b) Persons before whom depositions may be taken. Depositions may be taken before a person having power to administer oaths by the laws of the United States or of the place where the examination is held.

(c) Notice of examination. A party desiring to take the deposition of a person shall give notice in writing to every other party to the investigation of not less than ten (10) days if the deposition is to be taken within the United States, and not less than fifteen (15) days if the deposition is to be taken elsewhere. The administrative law judge may designate a shorter or longer time. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. A notice may provide for the taking of testimony by telephone, but the administrative law judge may, on motion of any party, require that the deposition be taken in the presence of the deponent. The parties may stipulate in writing, or the administrative law judge may upon motion order, that the testimony at a deposition be recorded by other than stenographic means. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(d) Taking of deposition. Each deponent shall be duly sworn, and any adverse party shall have the right to cross-examine. Objections to questions or documents shall be in short form, stating the grounds of objections relied upon. Evidence objected to shall be taken subject to the objections, except that privileged communications and subject matter need not be disclosed. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, after which the deposition shall be subscribed by the deponent (unless the parties by stipulation waive signing or the deponent is ill or cannot be found or refuses to sign) and certified by the person before whom the deposition was taken. If the deposition is not subscribed by the deponent, the person administering the oath shall state on the record such fact and the reasons therefor. When a deposition is recorded by stenographic means, the stenographer shall certify on the transcript that the witness was sworn in

the stenographer's presence and that the transcript is a true record of the testimony of the witness. When a deposition is recorded by other than stenographic means and is thereafter transcribed, the person transcribing it shall certify that the person heard the witness sworn on the recording and that the transcript is correct writing of the recording. Thereafter, that person shall forward one (1) copy to each party who was present or represented at the taking of the deposition.

(e) Depositions of nonparty officers or employees of the Commission or of other Government agencies. A party desiring to take the deposition of an officer or employee of the Commission other than the Commission investigative attorney, or of an officer or employee of another Government agency, or to obtain documents or other physical exhibits in the custody, control, and possession of such officer or employee, shall proceed by written motion to the administrative law judge for leave to apply for a subpoena under § 210.35(c). Such a motion shall be granted only upon a showing that the information expected to be obtained thereby is within the scope of discovery permitted by § 210.30(b) and cannot be obtained without undue hardship by alternative means.

(f) Filing of depositions. The party taking the deposition shall file one (1) copy thereof with the Commission investigative attorney, and shall give prompt notice of such filing to all other parties.

(g) Admissibility of depositions. The fact that a deposition is taken and filed with the Commission investigative attorney as provided in this section does not constitute a determination that it is admissible in evidence or that it may be used in the investigation. Only such part of a deposition as is received in evidence at a hearing shall constitute a part of the record in such investigation upon which a determination may be based. Objections may be made at the hearing to receiving in evidence any deposition or part thereof for any reason that would require the exclusion of the evidence if the witness were then present and testifying.

(h) Use of depositions. A deposition may be used as evidence against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisons:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent as a witness,

(2) The deposition of a party may be used by an adverse party for any purpose,

(3) The deposition of a witness, whether or not a party, may be used by any party for any purposes if the administrative law judge finds—

(i) That the witness is dead; or

(ii) That the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(v) Upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the oral testimony of witnesses at a hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part that ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

§ 210.32 Interrogatories.

(a) Scope; use at hearing. Any party may serve upon any other party written interrogatories to be answered by the party served. Interrogatories may relate to any matters that can be inquired into under § 210.30(b), and the answers may be used to the extent permitted by the rules of evidence.

(b) Procedure. (1) Interrogatories may be served upon any party after the date of publication in the **Federal Register** of the notice of investigation.

(2) Parties answering interrogatories shall repeat the interrogatories being answered immediately preceding the answers. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections are to be signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within ten (10) days after the service of the interrogatories. The administrative law judge may allow a shorter or longer time. The party submitting the interrogatories may move for an order under § 210.36(a) with respect to any objection to or other failure to answer an interrogatory.

(3) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the administrative law judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or a later time.

(c) Option to produce records. When the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. The specifications provided shall include sufficient detail to permit the interrogating party to identify readily the documents from which the answer may be ascertained.

§ 210.33 Request for production of documents and things and entry upon land.

(a) Scope. Any party may serve on any other party a request:

(1) To produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, and other data compilations from which information can be obtained), or to inspect and copy, test, or sample any tangible things that are in the possession, custody, or control of the party upon whom the request is served; or

(2) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 210.30(b).

(b) Procedure. (1) The request may be served upon any party after the date of publication in the **Federal Register** of the notice of investigation. The request shall set forth the items to be inspected, either by individual item or by category, and

describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(2) The party upon whom the request is served shall serve a written response within ten (10) days after the service of the request. The administrative law judge may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of any item or category, the part shall be specified. The party submitting the request may move for an order under § 210.36(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request.

(c) Persons not parties. This rule does not preclude issuance of an order against a person not a party to permit entry upon land.

§ 210.34 Request for admission.

(a) Form, content, and service of request for admission. Any party may serve on any other party a written request for admission of the truth of any matters relevant to the investigation and set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been otherwise furnished or are known to be, and in the request are stated as being, in the possession of the other party. Each matter as to which an admission is requested shall be separately set forth. The request may be served upon a party whose complaint is the basis for the investigation after the date of publication in the Federal Register of the notice of investigation. The request may be served upon any other party at any time twenty (20) days after the date of service of complaint and notice of investigation, unless leave of the administration law judge is obtained to serve the request at an earlier date.

(b) Answers and objections to requests for admissions. A party answering a request for admission shall repeat the request for admission immediately preceding his answer. The matter may be deemed admitted unless, within ten (10) days after service of the request, or within such shorter or longer time as the administrative law judge may allow, the party to whom the request is directed serves upon the party requesting the admission a sworn written answer or objection addressed to the matter. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter as to which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known to or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter as to which an admission has been requested presents a genuine issue for a hearing may not object to the request oin that ground alone; he may deny the matter or set forth reasons why he cannot admit or deny it.

(c) Sufficiency of answers. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objecting party sustains his burden of showing that the objection is justified, the administrative law judge shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of this section, he may order either that the matter is admitted or that an amended answer be served. The administrative law judge may, in lieu of these orders, determine that final disposition of the request be made at a prehearing conference or at a designated time prior to a hearing under this Part.

(d) Effect of admissions; withdrawal or amendment of admission. Any matter admitted under this rule may be conclusively established unless the administrative law judge on motion permits withdrawal or "amendment" of the admission. The administrative law judge may permit withdrawal or amendment when the presentation of the issues of the investigation will be subserved thereby and the party who obtained the admission fails to satisfy the administrative law judge that withdrawal or amendment will prejudice him in maintaining his position on the issues of the investigation. Any admission made by a party under this section is for the purpose of the pending investigation only and is not an admission by him for any other purpose not may it be used against him in any other proceeding.

§ 210.35 Subpoenas

(a) Application for issuance of a subpoena.—(1) Subpoena ad testificandum. An application for issuance of a subpoena requiring a person to appear and depose or testify at the taking of a deposition or at a hearing shall be made to the administrative law judge.

(2) Subpoena duces tecum. An application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, at a prehearing conference, at a hearing, or under any other circumstances, shall be made in writing to the administrative law judge and shall specify the material to be produced as precisely as possible, showing the general relevancy of the material and the reasonableness of the scope of the subpoena.

(b) Use of subpoena for discovery. Subpoenas may be used by any party for purposes of discovery or for obtaining documents, papers, books or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits that constitute or contain evidence relevant to the subject matter involved and that are in the possession, custody, or control of such person.

(c) Application for subpoenas for nonparty Commission records or personnel or for records and personnel of other Government agencies. (1) Procedure. An application for issuance of a subpoena requiring the production of nonparty documents, papers, books, physical exhibits, or other material in the records of the Commission, or requiring the production of records or personnel of other Government agencies shall specify as precisely as possible the material to be produced, the nature of the information to be disclosed, or the expected testimony of the official or employee, and shall contain a statement showing the general relevancy of the material, information, or testimony and the reasonableness of the scope of the application, together with a showing that such material, information, or testimony or their substantial equivalent

could not be obtained without undue hardship or by alternative means.

(2) Ruling. Such applications shall be ruled upon by the administrative law judge. To the extent that the motion is granted, the administrative law judge shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the official or employee as may appear necessary and appropriate for the protection of the public interest.

(3) Application for subpoena grounded upon the Freedom of Information Act. No application for a subpoena for production of documents grounded upon the Freedom of Information Act (5 U.S.C. 552) shall be entertained by the administrative law judge.

(d) Motion to limit or quash. Any motion to limit or quash a subpoena shall be filed within ten (10) days after service thereof, or within such other time as the administrative law judge may allow.

(e) Ex parte rulings on applications for subpoenas. Applications for the issuance of the subpoenas pursuant to the provisions of this section may be made ex parte, and, if so made, such applications and rulings thereon shall remain ex parte unless otherwise ordered by the administrative law judge.

§ 210.36 Failure to make discovery; sanctions

(a) Motion for order compelling discovery. A party may apply to the administrative law judge for an order compelling discovery upon reasonable notice to other parties and all persons affected thereby.

(b) Failure to comply with order compelling discovery. If a party or an officer or agent of a party fails to comply with an order including, but not limited to, an order for the taking of a deposition or the production of documents, an order to answer interrogatories, an order issued pursuant to a request for admissions, or an order to comply with a subpoena, the administrative law judge, for the purpose of permitting resolution of relevant issues and disposition of the investigation without unnecessary delay despite the failure to comply, may take such action in regard thereto as is just, including, but not limited to, the following:

(1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;

(2) Rule that for the purposes of the investigation the matter or matters concerning the order or subpoena issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely upon testimony by the party, officer, or agent, or documents, or other material, in support of his position in the investigation;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a motion or other submission by the party concerning the order or subpoena issued be stricken or rule by initial determination that a determination in the investigation be rendered against the party, or both. Any such action may be taken by written or oral order issued in the course of the investigation or by inclusion in the initial determination of the administrative law judge. It shall be the duty of the parties to seek, and that of the administrative law judge to grant, such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the lack of withheld testimony, documents, or other evidence. If in the administrative law judge's opinion such relief would not be sufficient, the administrative law judge shall certify to the Commission a request that court enforcement of the subpoena or other discovery order be sought.

§ 210.37 Protective Orders.

(a) Issuance of protective order. Upon motion by a party or by the person from whom discovery is sought or by the administrative law judge on his own initiative, and for good cause shown, the administrative law judge may make any order that may appear necessary and appropriate for the protection of the public interest or that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That discovery not be had:

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the administrative law judge;

(6) That a deposition, after being sealed, be opened only by order of the Commission or the administrative law judge;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Commission or the administrative law judge.

If the motion for a protective order is denied, in whole or in part, the Commission or the administrative law judge may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(b) Unauthorized disclosure of information. If confidential business information submitted in accordance with the terms of a protective order is disclosed to any person other than in a manner authorized by the protective order, the party responsible for the disclosure must immediately bring all pertinent facts relating to such disclosure to the attention of the submitter of the information and the administrative law judge or the Commission, and, without prejudice to other rights and remedies of the submitter of the information, make every effort to prevent further disclosure of such information by the party or the recipient of such information.

(c) Violation of protective order. Any individual who has agreed to be bound by the terms of a protective order issued pursuant to paragraph (a) of this section, and who is determined by the Commission or the administrative law judge to have violated the terms of the protective order may be subject to one or more of the following penalties:

(1) An official reprimand by the Commission;

(2) Disqualification from or limitation of further participation in a pending investigation;

(3) Temporary or permanent disqualification from practicing in any capacity before the Commission pursuant to § 201.15(a) of this chapter;

(4) Referral of the facts underlying the violation to the appropriate licensing authority in the jurisdiction in which the individual is licensed to practice;

(5) Sanctions as enumerated in § 210.36, or such other action as may be appropriate.

Such sanctions may be imposed upon the filing of a motion by a party or upon the administrative law judge's own motion. The administrative law judge shall allow the parties to make written submissions and if warranted to present

oral argument. The administrative law judge shall grant or deny a motion for sanctions by filing with the Commission an initial determination pursuant to § 210.53(c).

Subpart E—Prehearing Conferences and Hearings

§ 210.40 Prehearing conferences.

(a) When appropriate. The administrative law judge in any investigation may direct counsel or other representatives for all parties to meet with him for one or more conferences to consider any or all of the following:

(1) Simplification and clarification of the issues:

(2) Scope of the hearing;

(3) Necessity or desirability of amendments to pleadings subject, however, to the provisions of § 210.22;

(4) Stipulations and admissions of either fact or the content and authenticity of documents;

(5) Expedition in the discovery and presentation of evidence including, but not limited to, restriction of the number of expert, economic, or technical witnesses; and

(6) Such other matters as may aid in the orderly and expeditious disposition of the investigation including disclosure of the names of witnesses and the exchange of documents or other physical exhibits that will be introduced in evidence in the course of the hearing.

(b) *Subpoenas.* Prehearing conferences may be convened for the purpose of accepting returns on subpoenas duces tecum issued pursuant to the provisions of § 210.35(a)(2).

(c) *Reporting.* In the discretion of the administrative law judge, prehearing conferences may or may not be stenographically reported and may or may not be public.

(d) *Order.* The administrative law judge may enter in the record an order that recites the results of the conference. Such order shall include the administrative law judge's rulings upon matters considered at the conference, together with appropriate direction to the parties. The administrative law judge's order shall control the subsequent course of the hearing, unless modified to prevent manifest injustice.

§ 210.41 General provisions for hearings.

(a) *Purpose of hearings.* Unless otherwise ordered by the Commission:

(1) An opportunity for a hearing shall be provided in each investigation under section 337 of the Tariff Act to take evidence and hear argument for the purpose of determining whether there is a violation of section 337 of the Tariff Act.

(2) Except as provided under § 210.24(e)(13), an opportunity for a hearing shall also be provided to take evidence and hear argument for the purpose of determining whether there is reason to believe there is a violation of section 337 of the Tariff Act.

(b) *Public hearings.* All hearings in investigations under this Part shall be public unless otherwise ordered by the administrative law judge.

(c) *Expedition.* Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place, continuing until completed unless otherwise ordered by the administrative law judge.

(d) *Rights of the parties.* Every party shall have the right of due notice, cross examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

(e) *Presiding official.* An administrative law judge shall preside over each hearing unless the Commission shall otherwise order.

§210.42 Evidence.

(a) *Burden of proof.* The proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.

(b) *Admissibility.* Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded. Immaterial or irrelevant parts of an admissible document shall be segregated and excluded as far as practicable.

(c) *Information obtained in investigations.* Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by the Commission investigative attorney when necessary in connection with investigations and may be offered in evidence by the Commission investigative attorney.

(d) *Official notice.* When any decision of the administrative law judge rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.

(e) *Objections.* Objections to evidence shall be made in timely fashion and shall briefly state the grounds relied upon. Rulings on all objections shall appear on the record.

(f) *Exceptions.* Formal exception to an adverse ruling is not required.

(g) *Excluded evidence.* When an objection to a question propounded to a witness is sustained, the examining party may make a specific offer of what he expects to prove by the answer of the witness, or the administrative law judge may in his discretion receive and report the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained with the record so as to be available for consideration by any reviewing authority.

§ 210.43 Record.

(a) *Definition of the record.* The record shall consist of all pleadings, the notice of investigation, motions and responses, and other documents and things properly filed with the Secretary in accordance with § 210.5(b), in addition to all orders, notices, and initial determinations of the administrative law judge, orders and notices of the Commission, hearing and conference transcripts, evidence admitted into the record, and any other items certified into the record by the administrative law judge or the Commission.

(b) *Reporting and transcription.* Hearings shall be reported and transcribed by the official reporter of the Commission under the supervision of the administrative law judge, and the transcript shall be a part of the record.

(c) *Corrections.* Corrections of the transcript may be made only when they involve errors affecting substance and then only in the manner herein provided. Corrections ordered by the administrative law judge or agreed to in a written stipulation signed by all counsel and parties not represented by counsel and approved by the administrative law judge shall be included in the record, and such stipulations, except to the extent that they are capricious or without substance, shall be approved by the administrative law judge. Corrections shall not be ordered by the administrative law judge except upon notice and opportunity for the hearing of objections. Such corrections shall be made by the official reporter by furnishing substitute typed pages, under the usual certificate of the reporter, for insertion in the transcript. The original uncorrected pages shall be retained in the files of the Commission.

(d) *Certification of record.* Except as provided in § 210.24(e)(16) in connection with the disposition of motions for temporary relief, the record shall be certified to the Commission by the administrative law judge upon his filing of an initial determination or at such earlier time as the Commission may order.

§ 210.44 In camera treatment of confidential information.

(a) *Definition.* Except as hereinafter provided and consistent with §§ 210.6 and 210.37, confidential documents and testimony made subject to protective orders or orders granting in camera treatment are not made part of the public record and are kept confidential in an in camera record. Only the persons identified in a protective order, persons identified in § 210.6(b), and court personnel concerned with judicial review shall have access to confidential information on the in camera record. The right of the adminstrative law judge and the Commission to disclose confidential data under a protective order (pursuant to § 210.37) to the extent necessary for the proper disposition of each proceeding is specifically reserved.

(b) *In camera treatment of documents and testimony.* The administrative law judge shall have authority to order documents or oral testimony offered in evidence, whether admitted or rejected, to be placed in camera.

(c) *Part of confidential record.* In camera documents and testimony shall constitute a part of the confidential record of the Commission.

(d) *References to in camera information.* In the submittal of proposed findings, briefs, or other papers, counsel for all parties shall make an attempt in good faith to refrain from disclosing the specific details of in camera documents and testimony. This shall not preclude references in such proposed findings, briefs, or other papers to such documents or testimony including generalized statements based on their contents. To the extent that counsel consider it necessary to include specific details of in camera data in their presentations, such data shall be incorporated in separate proposed findings, briefs, or other papers marked "Business Confidential," which shall be placed in camera and become a part of the confidential record.

(e) *Motions to declassify.* Any party may move to declassify documents (or portions thereof) that have been designated confidential by the submitter but that do not satisfy the confidentiality criteria set forth in § 201.6(a). All such motions, whether brought at any time during the investigation or after conclusion of the investigation shall be addressed to and ruled upon by the presiding administrative law judge, or if the investigation is not before a presiding administrative law judge, by the chief administrative law judge or such administrative law judge as he or she may designate.

Subpart F—Determinations and Actions Taken

§ 210.50 Summary determinations.

(a) *Motions for summary determinations.* Any party may move with any necessary supporting affidavits for a summary determination in his favor upon all or any part of the issues to be determined in the investigation. Counsel or other representatives in support of the complaint may so move at any time after twenty (20) days following the date of service of the complaint and notice instituting the investigation, and any other party, or a respondent, may so move at any time after the date of publication in the **Federal Register** of the notice of investigation. Any such motion by any party, however, must be filed at least thirty (30) days before the date fixed for any hearing provided for in § 201.41.

(b) *Opposing affidavits; oral argument; time and basis for determination.* Any nonmoving party may, within ten (10) days after service of the motion, file opposing affidavits. The administration law judge may in his discretion or may at the request of any party set the matter for oral argument and call for the submission of briefs or memoranda. The determination sought by the moving party shall be rendered if the pleadings and any depositions, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.

(c) *Affidavits.* Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The administrative law judge may permit affidavits to be supplemented or opposed by depositions or further affidavits. When a motion for summary determination is made and supported as provided in this rule, a party opposing the motion may not rest upon mere allegations or denials in his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for hearing. If no such response is filed, a summary determination, if appropriate, shall be rendered.

(d) *Refusal of application for summary determination; continuances and other orders.* Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present facts essential to justify his opposition, the administrative law judge may refuse the application for summary determination or may order a continuance to permit affidavits to be obtained or depositions or other discovery to be had, or make such other order as is appropriate, and a ruling to that effect shall be made a matter of record.

(e) *Order establishing facts.* If on motion under this rule a summary determination is not rendered upon all the allegations for all the relief asked and a hearing is necessary, the administrative law judge shall make an order specifying the facts that appear without substantial controversy and directing further proceedings in the investigation. The facts so specified shall be deemed established.

(f) *Order of summary determination.* An order of summary determination shall constitute an initial determination of the administrative law judge under § 210.53 or § 210.24(e)(17).

§ 210.51 Termination of investigation.

(a) *Motions for termination.* Any party may move at any time for an order to terminate an investigation in whole or in part as to any or all respondents.

(b) *Settlement by licensing or other agreement.* (1) An investigation before the Commission may be terminated as provided in paragraph (a) of this section and pursuant to subsection (c) of section 337 of the Tariff Act on the basis of a licensing or other settlement agreement entered into between the complainant (all of the complainants if there is more than one) and one or more of the respondents. A motion for termination by such parties shall contain copies of the licensing or other settlement agreement, and any agreements supplemental thereto, and a statement that there are no other agreements, written or oral, express or implied between the parties concerning the subject matter of the investigation. If the licensing or other settlement agreement contains confidential business information within the meaning of § 201.6(a) of this chapter, a copy of the agreement with such information deleted shall accompany the motion.

(2) The motion, licensing or other agreement, and any agreements supplemental thereto, shall be certified by the administrative law judge to the Commission with an initial determination regarding the motion for termination. If the licensing or other agreement or the initial determination contains confidential business information, copies of the agreement and initial determination with confidential business information deleted shall be certified to the Commission simultaneously with the confidential versions of such documents.

The Commission shall promptly publish a notice in the **Federal Register** stating that an initial determination has been received terminating the respondent or respondents in question on the basis of a licensing or other settlement agreement, that nonconfidential versions of the initial determination and the agreement are available for inspection in the Office of the Secretary, and that interested persons may submit written comments concerning termination of the respondents in question within ten (10) days of the date of publication of the notice in the **Federal Register**. In accordance with subsection (c) of section 337 of the Tariff Act, an order of termination based upon such licensing or other settlement agreement need not constitute a determination as to violation of section 337.

(c) *Settlement by consent order.* An investigation before the Commission may be terminated as provided in paragraph (a) of this section and pursuant to subsection (c) of section 337 of the Tariff Act on the basis of a consent order settlement under § 211.20(b) of this chapter. In accordance with subsection (c) of section 337 of the Tariff Act, an order of termination based upon such a settlement need not constitute a determination as to violation of section 337.

(d) *Effect of termination.* Except as provided in paragraphs (b) and (c) of this section, an order of termination issued by the Commission shall constitute a determination of the Commission under § 210.56(c), and an order of termination issued by the administrative law judge shall constitute an initial determination under § 210.53.

§ 210.52 Proposed findings and conclusions.

At the time a motion for summary determination under § 210.50(a) or a motion for termination under § 210.51(a) is made, or when it is found that a party is in default under § 210.25, or at the close of the reception of evidence in any hearing held pursuant to this part (except as provided in § 210.24(e)(14)), or within a reasonable time thereafter fixed by the administrative law judge, any party may file proposed findings of fact and conclusions of law, together with reasons therefor. When appropriate, briefs in support of the proposed findings of fact and conclusions of law may be filed with the administrative law judge for his consideration. Such proposals and briefs shall be in writing, shall be served upon all parties in accordance with § 210.08, and shall contain adequate references to the record and the authorities on which the submitter is relying.

§ 210.53 Initial determination.

(a) *On issues concerning permanent relief.* Except as may otherwise be ordered by the Commission, within nine (9) months, or within fourteen (14) months in a more complicated case, of the date of publication in the **Federal Register** of the notice of investigation, the administrative law judge shall certify the record to the Commission and shall file with the Commission an initial determination as to whether there is a violation of section 337 of the Tariff Act.

(b) *On issues concerning temporary relief.* The disposition of an initial determination concerning temporary relief is governed by the provisions of § 210.24(e)(17).

(c) *On motions for summary determination, termination, finding of default, intervention, amendment to the complaint, or notice of investigation, a "more complicated" designation (except as provided in § 210.24(e)(11)), a "complicated" designation, suspension of an investigation, or sanctions for violation of a protective order.* (1) The administrative law judge shall grant by filing with the Commission an initial determination or shall deny by issuing an order directing denial the following types of motions after they have been filed: a motion for summary determination pursuant to § 210.50; a motion for termination pursuant to § 210.51; a motion for a finding of default pursuant to § 210.25; a motion for intervention pursuant to § 210.26; a motion to amend the complaint or notice of investigation pursuant to § 210.22; a motion to designate an investigation "more complicated" pursuant to § 210.59(a) (except as provided in § 210.24(e)(11)); a motion to designate an investigation "complicated" pursuant to § 210.59(b); or a motion to suspend an investigation pursuant to § 210.59 (a) or (b).

(2) Following a motion for a sanction for violation of a protective order § 210.37, the administrative law judge shall grant or deny such motions by filing with the Commission an initial determination.

(d) *Contents.* The initial determination shall include: an opinion stating findings (with specific page references to principal supporting items of evidence in the record) and conclusions and the reasons or bases therefor necessary for the disposition of all material issues of fact, law, or discretion presented in the record; and a statement that pursuant to § 210.53(h) of these rules, the initial determination shall become the determination of the Commission unless a party files a petition for review of the initial determination pursuant to § 210.54 or the Commission pursuant to § 210.55 orders on its own motion a review of the initial determination or certain issues therein.

(e) *Notice to and advice from departments and agencies.* The Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and such other departments and agencies as the Commission deems appropriate shall be served with a copy of the initial determination. The Commission shall consider comments, limited to issues raised by the record, the initial determination, and the petitions for review, received from such agencies when deciding whether to initiate review or the scope of review. The Commission shall allow such agencies twenty (20) days after the service of an initial determination filed pursuant to § 210.53(a) or ten (10) days after the service of an initial determination filed pursuant to § 210.53 (b) or (c) to submit their comments.

(f) *Initial determination made by the administrative law judge.* The initial determination shall be made and filed by the administrative law judge who presided over the investigation, except when that person is unavailable to the Commission.

(g) *Reopening of proceedings by the administrative law judge.* At any time prior to the filing of the initial determination, the administrative law judge may reopen the proceedings for the reception of additional evidence.

(h) *Effect.* An initial determination filed pursuant to § 210.53(a) shall become the determination of the Commission forty-five (45) days after the date of service of the initial determination, unless the Commission, within forty-five (45) days after the date of such service shall have ordered review of the initial determination or certain isues therein pursuant to § 210.54(b) or § 210.55, or by order shall have changed the effective date of the initial determination. An initial determination filed pursuant to § 210.53 (b) or (c) shall become the determination of the Commission thirty (30) days after the date of service of the initial determination, except that the disposition of an initial determination granting or denying a motion for temporary relief is governed by the provisions of § 210.24(e).

(i) *Notice of determination.* Except as provided in § 210.24(e)(17), in the event an initial determination becomes the determination of the Commission, the

parties shall be notified thereof by the Secretary.

§ 210.54 Petition for review.

(a) *The petition and responses.* (1) Except as provided in § 210.24(e)(17), any party to an investigation may request a review by the Commission of an initial determination by filing with the Secretary a petition for review, except that a party who has defaulted may not petition for review of any issue regarding which the party is in default. A petition for review of an initial determination filed pursuant to § 210.53(a) shall be filed within ten (10) days after the service of the initial determination. A petition for review of an initial determination filed pursuant to § 210.53(c) shall be filed within five (5) days after the service of the initial determination, except that a party or proposed respondent who has not responded to the motion before the administrative law judge pursuant to § 210.24(c) may be deemed to have consented to the relief requested and may not petition for review of the issues raised in the subject motion. A petition for review filed under this section shall:

(i) Identify the party seeking review;

(ii) Specify the issues upon which review of the initial determination is sought:

(A) A finding or conclusion of material fact is clearly erroneous;

(B) A legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or

(C) The determination is one affecting Commission policy.

(iii) Set forth a concise statement of the facts material to the consideration of the stated issues; and

(iv) Present a concise argument setting forth the reasons why review by the Commission is necessary or appropriate to resolve an important issue of fact, law, or policy.

(2) Any issue not raised in the petition for review filed under this section will be deemed to have been abandoned and may be disregarded by the Commission in reviewing an initial determination.

(3) Any party may file a response to the petition for review within five (5) days after service of the petition, except that a party who has defaulted may not file a response to any issue regarding which party is in default.

(b) *Grant or denial of review.* (1) The Commission shall decide whether to grant, in whole or in part, a petition for review filed pursuant to § 210.53(a) within forty-five (45) days of the service of the initial determination on the parties, or by such other time as the Commissioner may order. The Commission shall decide whether to grant, in whole or in part, a petition for review filed pursuant to § 210.53(c) within thirty (30) days of the service of the initial determination on the parties, or by such other time as the Commission may order.

(2) The Commission shall decide whether to grant a petition for review, based upon the petition and response thereto, without oral argument or further written submissions unless the Commission shall order otherwise. The standards for granting review of an initial determination are set forth in paragraph (a)(1)(ii) of this section.

(3) The Commission shall grant a petition for review and order review of an initial determination or certain issues therein when at least one of the participating Commissioners votes for ordering review. In its notice, the Commission shall establish the scope of the review and the issues that will be considered and make provisions for filing of briefs and oral argument if deemed appropriate by the Commission. The notice that the Commission has granted the petition for review shall be served by the Secretary on all parties, the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and such other departments and agencies as the Commission deems appropriate.

§ 210.55 Commission review on its own motion.

Within the time provided in § 210.53(h), the Commission on its own initiative may order review of an initial determination or certain issues therein when at least one of the participating Commissioners votes for ordering review. The standards for granting review of an initial determination are set forth in § 210.54(a)(1)(ii). This section does not apply to initial determinations issued pursuant to § 210.24(e)(17) or determinations issued by the presiding administrative law judge pursuant to § 210.24(e)(11).

§ 210.56 Review by Commission.

(a) *Briefs and oral argument.* In the event the Commission orders review of an initial determination, the parties may be requested to file review briefs concerning the issues on review at a time and of a size and nature set forth in the notice of review. The parties, within the time provided for filing the review briefs, may submit a written request for a hearing to present oral argument before the Commission, which the Commission in its discretion may grant or deny. The Commission shall grant the request when at least one of the participating Commissioners votes in favor of the request.

(b) *Scope of review.* Only the issues set forth in the notice of review, and all subsidiary issues therein, will be considered by the Commission.

(c) *Determination on review.* On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge and make any findings or conclusions that in its judgment are proper based on the record in the proceeding.

(d) *Initial determinations concerning temporary relief.* Commission action on an initial determination concerning temporary relief is governed by the provisions of § 210.24(e) (17) and (18).

§ 210.57 Implementation of Commission action.

(a) *Service of Commission determination upon the parties.* A Commission determination pursuant to § 210.56(c) or a termination on the basis of a licensing or other agreement or consent settlement pursuant to § 210.51 (b) and (c), respectively, shall be served upon each party to the investigation.

(b) *Publication and transmittal to the President.* A Commission determination that there is a violation of section 337, or that there is reason to believe that there is such a violation, together with the action taken relative to such determination, or Commission action pursuant to Subparts B and C of Part 211 of this chapter shall be immediately published in the **Federal Register** and transmitted to the President, together with the record upon which it is based.

(c) *Enforceability of Commission action.* Unless otherwise specified, any Commission action, other than an exclusion order or order directing seizure and forfeiture of articles imported in violation of an outstanding exclusion order shall be enforceable upon receipt by the affected party of notice of such action. Exclusion orders and seizure and forfeiture orders shall be enforceable upon receipt of notice thereof by the Secretary of the Treasury.

(d) *Finality of affirmative Commission action.* If the President does not disapprove for policy reasons such Commission action within a period of sixty (60) days beginning on the day after delivery of a copy of such Commission action to the President, or if the President notifies the Commission before the close of such period that he approves such Commission action, then such Commission action shall become final on the day after the close of such period, or the day on which the

President notifies the Commission of his approval, as the case may be.

(e) *Duration.* Final Commission action shall remain in effect as provided in Subpart C of Part 211 of this Chapter.

§ 210.58 Commission action, public interest factor, and bonding.

(a) During the course of each proceeding under this Part when an investigation has been instituted, the Commission shall—

(1) Consider what action (general or limited exclusion of articles from entry and/or a cease and desist order, or exclusion of articles from entry under bond and/or a temporary cease and desist order), if any, it should take, and, when appropriate, take such action;

(2) Consult with and seek advice and information from the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and such other departments and agencies as it considers appropriate, concerning the subject matter of the complaint and the effect its actions (general or limited exclusion of articles from entry and/or a cease and desist order, or exclusion of articles from entry under bond and/or a temporary cease and desist order) under section 337 of the Tariff Act shall have upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers;

(3) Determine the amount of the bond to be posted pursuant to paragraph (3) of subsection (j) of section 337 of the Tariff Act taking into account, among other things, the amount that would offset any competitive advantage resulting from the alleged unfair methods of competition and unfair acts enjoyed by persons benefitting from the importation of the articles in question.

(4) Receive submissions from the parties, other interested persons, Government agencies and departments, and the public with respect to the subject matter of paragraphs (a) (1), (2), and (3), of this section, which submissions shall be served upon the parties and be available to the public in the Office of the Secretary. The Commission will consider motions for oral argument or, when necessary, for a hearing with respect to the subject matter of this section, except with respect to the grant or denial of temporary relief on a motion filed pursuant to § 210.24(e).

(b) Unless otherwise ordered by the Commission or permitted by this paragraph, and except as provided in § 210.24(e) (12) and (13), the administrative law judge shall not take evidence or other information or hear arguments from the parties and other interested persons with respect to the subject matter of paragraphs (a) (1), (2), (3), and (4) of this section. However, with regard to settlements by agreement or consent order under §210.51 (b) and (c), the parties may file statements regarding the impact of the proposed settlement on the public interest, and the administrative law judge may in his discretion hear argument, although no discovery may be compelled with respect to issues relating solely to the public interest. Thereafter, the administrative law judge shall consider and make appropriate findings in the initial determination regarding the effect of the proposed settlement on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers. With respect to raising the issues of appropriate Commission action, the public interest, and bonding for purposes of an initial determination concerning the grant or denial of a motion for temporary relief, see § 210.24(e) (12), (13), and (17).

§ 210.59 Period for concluding Commission investigation.

(a) Each investigation instituted under this Part shall be concluded and a final order issued no later than twelve (12) months after the date of publication in the **Federal Register** of the notice instituting the investigation, except that the Commission may designate the investigation as a "more complicated" investigation and require that it be concluded no later than eighteen (18) months after the date of publication in the **Federal Register** of the notice of investigation. A "more complicated" investigation refers to an investigation that is of an involved nature owing to the subject matter, difficulty in obtaining information, the large number of parties involved, or other significant factors. The Commission shall publish its reasons for designating the investigation as a "more complicated" ivnestigation in the **Federal Register**. In computing the 12-month and 18-month periods prescribed by this paragraph, there shall be excluded any period of time during which the investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

(b) An investigation may be designated "more complicated" by the Commission or the presiding administrative law judge pursuant to § 210.24(e)(11) for the purpose of extending the statutory deadline for determining whether to grant or deny a motion for temporary relief. The Commission's or the administrative law judge's reasons for designating the investigation "more complicated" for that purpose shall be published in the **Federal Register**. In computing the statutory deadline for determining whether to grant or deny a motion for temporary relief in an investigation designated "more complicated" pursuant to this paragraph (and § 210.24(e)(11)), there shall be excluded any period of time during which the investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

(c) Notwithstanding any provision of paragraph (a) of this section, the Commission may extend, by not more than ninety (90) days, the 12-month or 18-month period within which the Commission is required to make a final determination in an investigation if the Commission would be required to make such determination before the 180th day after the date of enactment of the Omnibus Trade and Competitiveness Act of 1988 and the Commission finds that the investigation is "complicated." A "complicated" investigation is one in which the following circumstances exist:

(1) Previously established deadlines or procedures must be changed in order to comply with provisions of the Omnibus Trade and Competitiveness Act of 1988 which amend section 337 of the Tariff Act; and

(2) The altered deadlines or procedures are impracticable, prejudice the rights of the parties, adversely affect the public interest, or create the possibility that the Commission will be unable to conclude the investigation by the prescribed 12-month or 18-month statutory deadline.

Unless otherwise ordered by the Commission, in order to obtain and implement the "complicated" designation and resulting extension of time, the parties, the administrative law judge, and the Commission shall follow the procedures used to obtain and implement a "more complicated" designation. (See §§ 210.53(c)–(i), 210.54, 210.55, 210.56 (a) through (c), and 210.57(a)). The Commission shall publish its reasons for designating an investigation "complicated" in the **Federal Register**. In computing the new termination deadline resulting from such designation, there shall be excluded any period of time during which the investigation is suspended because of proceedings in a court or agency of the United States involving similar

questions concerning the subject matter of such investigation.

Subpart G—Appeals

§ 210.60 Petition for reconsideration.

Within fourteen (14) days after service of a Commission determination, any party may file with the Commission a petition for reconsideration of such determination or any action ordered to be taken thereunder, setting forth the relief desired and the grounds in support thereof. Any petition filed under this section must be confined to new questions raised by the determination or action ordered to be taken thereunder and upon which the petitioner had no opportunity to submit arguments. Any party desiring to oppose such a petition shall file an answer thereto within five (5) days after service of the petition upon such party. The filing of a petition for reconsideration shall not stay the effective date of the determination or action ordered to be taken thereunder or toll the running of any statutory time period affecting such determination or action ordered to be taken thereunder unless specifically so ordered by the Commission.

§ 210.61 Disposition of Petition for reconsideration.

The Commission may affirm, set aside, or modify its determination, including any action ordered by it to be taken thereunder. When appropriate, the Commission may order the administrative law judge to take additional evidence.

§ 210.70 Interlocutory appeals.

Rulings by the administrative law judge on motions may not be appealed to the Commission prior to the administrative law judge's issuance of his initial determination, except in the following circumstances:

(a) *Appeals without leave of the administrative law judge.* The Commission may in its discretion entertain interlocutory appeals, except as provided in § 210.24(e)(15), when a ruling of the administrative law judge:

(1) Requires the disclosure of the Commission records or requires the appearance of Government officials pursuant to § 210.35(c); or

(2) Denies an application for intervention pursuant to the provisions of § 210.26. Appeals from such ruling may be sought by filing an application for review, not to exceed fifteen (15) pages with the Commission within five (5) days after notice of the administrative law judge's ruling. An answer to the application for review may be filed within five (5) days after service of the application. The application for review should specify the person or party taking the appeal, designate the ruling or part thereof from which appeal is being taken, and specify the reasons and present arguments as to why review is being sought. The Commission may, upon its own motion, enter an order staying the return date of an order issued by the administrative law judge pursuant to § 210.35(c) or an order placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues that will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

(b) *Appeals with leave of the administrative law judge.* Except as otherwise provided in paragraph (a) of this section and § 210.24(e)(15), applications for review of a ruling by an administrative law judge may be allowed only upon request made to the administrative law judge and upon determination by the administrative law judge in writing, with justification in support thereof, that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion, and that either an immediate appeal from the ruling may materially advance the ultimate completion of the investigation or subsequent review will be an inadequate remedy. Applications for review in writing, not to exceed fifteen (15) pages, may be filed within five (5) days after notice of the administrative law judge's determination. An answer to the application for review may be filed within five (5) days after service of the application for review. Thereupon, the Commission may, in its discretion, permit an appeal. Commission review, if permitted, shall be confined to the application for review and answer thereto, without oral argument or further briefs, unless otherwise ordered from the Commission.

(c) *Investigation not stayed.* Application for review under this section shall not stay the investigation before the administrative law judge unless the administrative law judge or the Commission shall so order.

§ 210.71 Appeals of final determination to the United States Court of Appeals for the Federal Circuit.

Any person adversely affected by a final determination of the Commission under subsection (d), (e), (f) or (g) of section 337 of the Tariff Act may appeal such determination to the United States Court of Appeals for the Federal Circuit.

2. Part 211 is revised to read as follows:

PART 211—ENFORCEMENT PROCEDURES

Authority: 19 U.S.C. 1333, 1335, and 1337.

§ 211.01 Purpose.

This part sets forth procedures for the settlement by consent of matters that involve alleged violations of section 337 of the Tariff Act of 1930 and for the enforcement, modification, and revocation of final Commission actions. Definitions applicable to Part 210 apply to this part unless specifically provided otherwise.

Subpart A—Informal Enforcement Procedure

§ 211.10 Informal disposition through voluntary compliance.

(a) Opportunity for informal disposition. When the Commission has information obtained during the course of an informal inquiry or preliminary investigation pursuant to section 603 of the Trade Act of 1974 (19 U.S.C. 2482) indicating that a person may be engaging in a practice that may involve a violation of section 337 of the Tariff Act of 1930, it may afford such person the opportunity to have the matter disposed of on an informal administrative basis if it deems that the public-interest factors set forth in

§ 210.58(a)(2) of this chapter will be fully safeguarded thereby.

(b) Public-interest factors to be considered. In determining whether the public-interest factors set forth in § 210.58(a)(2) of this chapter will be fully safeguarded through such informal administrative action, the Commission will consider:

(1) The nature and gravity of the practice;

(2) Whether the practice is likely to recur;

(3) The prior record and good faith of the person involved;

(4) The adequacy of assurance of voluntary compliance; and

(5) Any other relevant factor that the Commission deems appropriate.

Subpart B—Consent Order Procedure

§ 211.20 Opportunity to submit proposed consent order.

(a) Prior to institution of an investigation. Where time, the nature of the proceeding, and the public interest permit, any person being investigated pursuant to section 603 of the Trade Act of 1974 (19 U.S.C. 2482) or § 210.11(b) shall be afforded the opportunity to submit to the Commission a proposal for disposition of the matter under investigation in the form of a consent order agreement that incorporates a proposed consent order executed by or on behalf of such person and that complies with the requirements of § 211.22.

(b) Subsequent to institution of an investigation. In investigations under section 337 of the Tariff Act of 1930, a proposal to settle a matter by consent shall be submitted as a motion to the presiding officer to terminate an investigation under § 210.51 of this chapter together with a consent order agreement that incorporates a proposed consent order. If the consent order agreement contains confidential business information within the meaning of § 201.6 of this chapter, a copy of the agreement with such information deleted shall accompany the motion. The proposed agreement shall comply with the requirements of § 211.22. At any time prior to commencement of a hearing as provided in § 210.41(a)(1) of this chapter, the motion may be filed jointly by all of the following:

(1) All private complainants;

(2) The Commission investigative attorney; and

(3) One or more respondents.

However, upon request and for good cause shown, the presiding officer may consider such a motion during or after a hearing. The filing of the motion shall not stay proceedings before the presiding officer unless the presiding officer so orders. The presiding officer shall promptly file with the Commission an initial determination regarding the motion for termination. If the initial determination contains confidential business information, a copy of the initial determination with such information deleted shall be filed with the Commission simultaneously with the filing of the confidential version of the initial determination. The Commission shall promptly publish a notice in the **Federal Register** stating that an initial determination has been received terminating the respondent or the respondents in question on the basis of a consent order agreement, that nonconfidential versions of the initial determination and consent order agreement are available for inspection in the Office of the Secretary, and that interested persons may submit written comments concerning termination of the respondents in question within ten (10) days of the date of publication of the notice in the **Federal Register**. Pending disposition by the Commission of a consent order agreement, a party may not, absent good cause shown, withdraw from the agreement once it has been submitted pursuant to this section.

§ 211.21 Settlement by consent.

(a) After the initial determination on the motion for termination based on a consent order agreement has been filed with the Commission, the Commission shall promptly serve copies of the nonconfidential version of the initial determination and the proposed consent order agreement on the Department of Health and Human Services, the Department of Justice, and the Federal Trade Commission, and such other departments and agencies as the Commission deems appropriate.

(b) The Commission, after considering the effect of the consent order upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers in the manner provided by § 210.58(a) of this chapter, shall dispose of the initial determination according to the procedures of §§ 210.53 through 210.56 of this chapter. In accordance with subsection (c) of section 337 of the Tariff Act of 1930, an order of termination based upon a consent order agreement need not constitute a determination as to violation of section 337.

§ 211.22 Contents of consent order agreement.

(a) Contents. Every consent order agreement shall contain, in addition to the appropriate proposed consent order, the following:

(1) An admission of all jurisdictional facts;

(2) An express waiver of all rights to seek judicial review or otherwise challenge or contest the validity of the consent order; and

(3) A statement that the enforcement, modification, and revocation will be carried out pursuant to Subpart C of Part 211, incorporating by reference the Commission's Rules of Practice and Procedure.

The consent order agreement may contain a statement that the signing thereof is for settlement purposes only and does not constitute admission by any party that section 337 of the Tariff Act of 1930 has been violated.

(b) Effect, interpretation, and reporting. The consent order shall have the same force and effect and may be enforced, modified, or revoked in the same manner as is provided in section 337 of the Tariff Act of 1930 and Parts 210 and 211 for other Commission action. Except as otherwise provided in the agreement, the complaint and notice of investigation or the proposed complaint may be used in construing the terms of the consent order, but no agreement, understanding, representation or interpretation not contained in the consent order agreement or Commission decision accompanying the consent order may be used to vary the terms of the consent order. The Commission may require periodic compliance reports pursuant to Subpart C of Part 211 to be submitted by the person entering into the consent order agreement.

Subpart C—Enforcement, Modification, and Revocation of Final Commission Actions

§ 211.50 Applicability, purpose, and retroactivity.

(a) Applicability. The rules in this subpart apply to final Commission actions issued by the Commission under section 337 of the Tariff Act of 1930, including exclusion orders, cease and desist orders, and consent orders.

(b) Purpose. The purpose of this subpart is to set forth procedures for the enforcement, modification, and revocation of final Commission actions.

(c) Retroactivity. The rules in this subpart apply to final Commission actions taken before the effective date

of these rules only to an extent not inconsistent with such final actions.

§ 211.51 Information gathering.

(a) Power to require information. Whenever the Commission takes a final Commission action, it may require any person to report facts available to that person that will aid the Commission in determining whether and to what extent there is compliance with the action or whether and to what extent the conditions that led to the action are changed. The Commission may also include provisions that exercise any other information gathering power available to it by law. The Commission may at any time request the cooperation of any person or agency in supplying it with information that will aid it in these determinations.

(b) Form and detail of reports. Reports under paragraph (a) of this section are to be in writing, under oath, and in such detail and in such form as the Commission prescribes. A final Commission action may also contain terms and conditions that exercise, or make possible the exercise of, on conditions precedent, any power of information gathering available to the Commission by law, subject to the standards of paragraph (a) of this section.

(c) Power to enforce informational requirements. Terms and conditions of final Commission actions for reporting and information gathering, and modifications of such terms and conditions, shall be enforceable by the Commission by a civil action under 19 U.S.C. 1333 or, at the Commission's discretion, in the same manner as any other provision of the final Commission action is enforceable.

(d) Term of reporting requirement. The Commission may prescribe in the final Commission action (or, in the case of a consent order, approve) the frequency of reporting or information gathering and the date on which these activities are to terminate. If no date for termination is provided, reporting and information gathering shall terminate when the final Commission action or any amendment to it expires by its own terms or is terminated. The Commission may modify informational requirements of a final Commission action at any time pursuant to §§ 211.53 and 211.55.

§ 211.52 Confidentiality of information.

Confidential information (as defined in § 201.6(a) of this Chapter) that is provided to the Commission pursuant to final Commission action will be received by the Commission in confidence. The restrictions on disclosure and the procedures for handling such information (which are set out in §§ 210.6 and 210.44 of this chapter) shall apply and, in a proceeding under § 211.56 or § 211.57, the Commission or the presiding administrative law judge may, upon motion or *sua sponte,* issue or continue appropriate protective orders.

§ 211.53 Review of reports.

(a) Review to insure compliance. The Commission, through its Office of Unfair Import Investigations, will review reports submitted pursuant to any final Commission action and conduct such further investigation as it deems necessary to insure compliance with its orders and to ascertain if such orders are being violated.

(b) Extension of time. The Director of the Office of Unfair Import Investigations may, for good cause shown, extend the time for filing reports required by Commission orders. An extension of time within which a report may be filed, or the filing of a report that does not evidence full compliance with the order, does not in any circumstances suspend or relieve a respondent from its obligation under the law with respect to compliance with such order.

§ 211.54 Advice concerning Commission orders.

(a) Advice to respondents submitting information. The Commission may advise respondents reporting or providing information whether their reports or information comply with a final Commission order or whether the actions or information set forth therein evidence compliance with the Commission order. The Commission may, in any event, institute proceedings pursuant to § 211.56 to enforce compliance with an order.

(b) Advisory opinions. Upon request of a respondent, the Commission may, upon such investigation as it deems necessary, issue an advisory opinion as to whether a respondent's proposed new course of action or conduct would violate the Commission order or section 337 of the Tariff Act of 1930. The Commission will consider whether the issuance of such an advisory opinion would facilitate the enforcement of section 337, would be in the public interest, and would benefit consumers and competitve conditions in the United States.

(c) Revocation. The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind as well as an opportunity to submit its views to the Commission. The Commission will not proceed against a respondent for violation of an order with respect to any action that was taken in good faith reliance upon the Commission's approval or advice under this section, if all relevant facts were fully, completely, and accurately presented to the Commission and such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

§ 211.55 Modification of information requirements.

(a) Cease and desist orders. The Commission may modify reporting requirements of cease and desist orders as necessary to assure compliance with an outstanding action, to take account of changed circumstances, or to minimize the burden of reporting or informational access. An order to modify reporting requirements shall identify the reports involved and state the reason or reasons for modification. No reporting requirement will be suspended during the pendency of such a modification unless the Commission so orders. The Commission may, if the public interest warrants, announce that a modification of reporting is under consideration and ask for comment, but it may also modify any reporting requirement at any time without notice, consistent with the standards of this section.

(b) Consent orders. Consistent with the standards set forth in paragraph (a) of this section, the Commission may modify reporting requirements of consent orders. The Commission shall publish a notice of any proposed change in the **Federal Register,** together with the reporting requirements to be modified and the reasons therefor, and serve notice on each party subject to the proposed modified consent order. Such parties shall be given the opportunity to sumit briefs to the Commission, and the Commission may hold a hearing on the matter.

§ 211.56 Proceedings to enforce Commission orders.

(a) Informal enforcement proceedings. Informal enforcement proceedings may be conducted by the Commission, through its Office of Unfair Import Investigations, with respect to any act or omission by any person in violation of any provision of a final Commission action. Such matters may be handled by the Commission through correspondence or conference or in any other way that the Commission deems appropriate. The Commission may issue such orders as it deems appropriate to implement and

insure compliance with the terms of a cease and desist or exclusion order, or any part thereof. Any matter not disposed of informally may be made the subject of a formal proceeding pursuant to this Subpart.

(b) Court enforcement. To enforce a Commission order, the Commission may, without prior notice of any kind to a respondent or any proceeding otherwise available under the section, initiate a civil action in a U.S. district court pursuant to subsection (f) of section 337 of the Tariff Act of 1930, requesting the imposition of such civil penalty or the issuance of such mandatory injunctions as the Commission deems necessary to enforce its orders and protect the public interest.

(c) Formal Commission enforcement proceedings. The Commission may institute an enforcement proceeding at the Commission level by docketing a complaint setting forth alleged violations of any final Commission order. The complaint, if docketed, shall be served upon the alleged violator, and notice of the complaint and the institution of formal enforcement proceedings shall be published in the **Federal Register.** Within fifteen (15) days after the date of receipt of such complaint, the named respondent shall file a response. Responses shall fully advise the Commission as to the nature of any defense and shall admit or deny each allegation of the complaint specifically and in detail unless the respondent is without knowledge, in which case its answer shall so state and the statement shall operate as a denial. Allegations of fact not denied or controverted shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered and shall, in the absence of a reply, be deemed uncontroverted.

(1) Failure of a respondent to file and serve a response within the time and in the manner prescribed herein shall authorize the Commission, in its discretion, to find the facts alleged in the complaint to be true and to take such action as may be appropriate without notice or hearing, or, in its discretion, to proceed without notice to take evidence on the allegations or charges set forth in the complaint, provided that the Commission or the presiding officer (if one is appointed) may permit late filing of an answer for good cause shown.

(2) The Commission, in the course of a formal enforcement proceeding under paragraph (c) of this section, may hold a public hearing and afford the parties to the enforcement proceeding the opportunity to appear and be heard. The hearing provided for under paragraph (c) of this section is not subject to sections 554, 556, 557, and 702 of title 5, United States Code. The Commission may delegate any hearing under paragraph (c) of this section to the Chief Administrative Law Judge for designation of a presiding administrative law judge, who shall certify a recommended determination to the Commission.

(3) Upon conclusion of an enforcement proceeding under paragraph (c) of this section, the Commission may modify a cease and desist, consent, or exclusion order in any manner necessary to prevent the unfair practices that were originally the basis for issuing such order, bring civil actions in a United States district court pursuant to § 211.56(b) (and subsection (f) of section 337 of the Tariff Act of 1930) requesting the imposition of a civil penalty or the issuance of mandatory injunctions incorporating the relief sought by the Commission, or revoke the cease and desist order or consent order and direct that the articles concerned be excluded from entry into the United States.

(4) Prior to effecting any modification, or revocation, and/or exclusion, under paragraph (c) of this section, the Commission shall consider the effect of such action upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers.

(5) In lieu of or in addition to taking the action provided for in paragraph (a)(3) of this section, the Commission may issue, pursuant to subsection (i) of section 337 of the Tariff Act of 1930, an order providing that any article imported in violation of the provisions of section 337 of the Tariff Act and an outstanding final exclusion order issued pursuant to subsection (d) of section 337 be seized and forfeited to the United States, if the following conditions are satisfied:

(i) The owner, importer, or consignee of the article (or the agent of such person) previously attempted to import the article into the United States;

(ii) The article previously was denied entry into the United States by reason of a final exclusion order; and

(iii) Upon such previous denial of entry, the Secretary of the Treasury provided the owner, importer, or consignee of the article (or the agent of such person) with written notice of the aforesaid exclusion order and the fact that seizure and forfeiture would result from any further attempt to import the article into the United States.

§ 211.57 Modification or rescission of final Commission actions.

(a) Petitions for modification or rescission of final Commission actions. (1) Whenever any person believes that conditions of fact or law, or the public interest, require that a final Commission action be modified or set aside, in whole or in part, such person may file with the Commission a petition requesting such relief. The Commission may also on its own initiative consider such action. The petition shall state the changes desired and the changed circumstances warranting such action, and shall include materials and argument in support thereof.

(2) If the petitioner previously has been found by the Commission to be in violation of section 337 of the Tariff Act of 1930 and if his petition requests a Commission determination that the petitioner is no longer in violation of that section or requests modification or rescission of an order issued pursuant to subsections (d), (e), (f), (g), or (i) of section 337, the burden of proof in any proceeding initiated in response to the petition pursuant to paragraph (b) of this section shall be on the petitioner. In accordance with subsection (k) of section 337, relief may be granted by the Commission with respect to such petition on the basis of new evidence or evidence that could not have been presented at the prior proceeding or on grounds that would permit relief from a judgment or order under the Federal Rules of Civil Procedure.

(b) Commission action upon receipt of petition. Upon receiving a petition, the Commission shall either provisionally accept the petition or reject it. The Commission shall treat a self-initiated action as a provisionally accepted petition under this section. Upon provisional acceptance, notice thereof shall be published in the **Federal Register**, and the petition and the notice shall be served on each former party to the original investigation under section 337 of the Tariff Act of 1930. Within thirty (30) days after the service of such petition, any party served may file an answer. The Commission may hold a public hearing and afford interested persons the opportunity to appear and be heard. After consideration of the petition, any responses thereto, or any information placed on the record at a public hearing or otherwise, the Commission shall take such action as it deems appropriate. Any final Commission action will, if not modified or revoked, expire by terms stated in the action. The Commission may delegate any hearing under this section to the Chief Administrative Law Judge for

designation of a presiding administrative law judge, who shall certify a recommended determination to the Commission.

§ 211.58 Temporary emergency action.

(a) Whenever the Commission determines, pending a formal enforcement proceeding under § 211.56(b), that without immediate action a violation of a Commission order will occur and that subsequent action by the Commission would not adequately repair substantial harm caused by such violation, the Commission may immediately and without hearing or notice modify or revoke such order and, if it is revoked, replace the order with an appropriate exclusion order.

(b) If the Commission determines, pending a formal enforcement proceeding under § 211.56(b), that without immediate action a violation of a final exclusion order will occur and that subsequent action by the Commission would not adequately repair substantial harm caused by such violation, the Commission may immediately and without hearing or notice issue an order requiring temporary seizure and forfeiture of the imported articles in question, provided the following requirements are satisfied:

(1) The owner, importer, or consignee of the article (or the agent of such a person) previously attempted to import the article into the United States;

(2) The article was previously denied entry into the United States by reason of a final exclusion order; and

(3) Upon such previous denial of entry, the Secretary of the Treasury provided the owner, importer, or consignee of the article (or the agent of such person) with written notice of the aforesaid exclusion order and the fact that seizure and forfeiture would result from any further attempt to import the article into the United States.

(c) Prior to taking any action under this section, the Commission shall consider the effect of such action upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers. The Commission shall, if it has not already done so, institute a formal enforcement proceeding under § 211.56 at the time of taking action under this section or as soon as possible thereafter, in order to give the alleged violator and other interested parties a full opportunity to present information and views regarding the continuation, modification, or revocation of Commission action taken under this section.

§ 211.59 Notice of enforcement action to Government agencies.

(a) Consultation. The Commission may consult with or seek information from any Government agency while taking action under this subpart.

(b) Notification of Treasury. The Commission shall notify the Secretary of the Treasury of any action under this subpart that results in a permanent or temporary exclusion of articles from entry, or the revocation of an order to such effect, or the issuance of an order compelling seizure and forfeiture of imported articles.

By order of the Commission.

Kenneth R. Mason,

Secretary.

Issued: August 24, 1988.

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Part X

Department of Transportation

National Highway Traffic Safety Administration

49 CFR Part 531

Passenger Automobile Average Fuel Economy Standards for Model Years 1989 and 1990; Proposed Rule

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 531

[Docket No. FE-88-01; Notice 2]

[RIN No. 2127-AB75]

Passenger Automobile Average Fuel Economy Standards for Model Years 1989 and 1990

AGENCY: National Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); notice of public meeting; response to petitions.

SUMMARY: The National Highway Traffic Safety Administration is seeking public comment on whether to reduce the passenger car corporate average fuel economy standards for Model Year 1989, 1990, or both. NHTSA is taking this action to determine whether retaining the 27.5 mpg standard (which is set by statute) would have a significant, adverse effect on U.S. employment or on the competitiveness of the U.S. auto industry. Until recently, the Department had no evidence to support the motion that the 1989 or 1990 standard might have such significant effects. Within the past few weeks, however, NHTSA has received information suggesting that the MY 1989 and 1990 standard could threaten the competitiveness of the U.S. auto industry. In addition, the Department seeks comment on whether the Department will be able to find again that a substantial share of the market made reasonable efforts to achieve the statutory standard. Accordingly, NHTSA is proposing to set the standard at a level between 26.5 and 27.5 mpg.

DATES: *Written Comments:* The agency is providing different comment periods for the proposed MY 1989 and MY 1990 standards. Written comments on the proposed MY 1989 standard must be received on or before September 15, 1988. Written comments on the proposed MY 1990 standard must be submitted by October 28, 1988. An explanation of the abbreviated comment period for the proposed MY 1989 standard is provided in the Supplementary Information section of this notice.

Public Meeting: A public meeting to receive oral comments on the proposed standards for both model years will be held on September 14, 1988, at 9 a.m., at the Department of Commerce Auditorium, 14th Street and Constitution Ave. NW. in Washington, DC.

Effective Date: The proposed amendments would be effective for MYs 1989–90.

ADDRESSES: *Written Comments:* Each written comment on these proposals must refer to the docket and notice numbers set out in brackets underneath "49 CFR Part 531" in the heading of this document and must be submitted (preferably 10 copies) to the Docket Section, National Highway Traffic Safety Administration, Room 5109, 400 Seventh Street SW., Washington, DC 20590. Submissions containing information for which confidential treatment is requested should be submitted (3 copies) to the Chief Counsel, National Highway Traffic Safety Administration, Room 5219, 400 Seventh Street SW., Washington, DC 20590, and 7 additional copies from which the purportedly confidential information has been deleted should be sent to the Docket Section, at the address given above.

Public Meeting: The September 14, 1988 public hearing will be held at the U.S. Dep't of Commerce Auditorium, Herbert C. Hoover Building, 14th Street and Constitution Ave. N.W., Washington, DC. (The entrance to the auditorium is on 14th Street.)

FOR FURTHER INFORMATION CONTACT: *Questions regarding the public meeting:* Mr. James Jones, Office of Market Incentives, National Highway Traffic Safety Administration, 400 Seventh Street SW., Washington, DC 20590. (202–366–4793). *All other questions:* Mr. Orron Kee, Office of Market Incentives, National Highway Traffic Safety Administration, 400 Seventh Street SW., Washington, DC 20590. (202) 366–0846.

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I. Introduction

For several years, the Secretary of Transportation has been calling public attention to the serious economic dislocations threatened by the law establishing the Corporate Average Fuel Economy (CAFE) program. Among other things, the Department has found, in previous years, that industry actions needed to comply with the statutory standard of 27.5 mpg seriously threatened American jobs. Indeed, the Department found specifically that tens of thousands of U.S. jobs could have been lost, had the fuel economy standard been retrained at 27.5 mpg. Accordingly the Department reduced the standards for Model Years 1986 through 1988, finding that the potential for significant economic harm from the higher standard outweighed the negligible energy savings that could (theoretically) be realized from the higher standard.

One of the most perverse aspects of the CAFE law is its positive incentive to ship U.S. jobs out of this country. The law requires that manufacturers separate their fleets into two categories: a "domestic" fleet and a "not domestically manufactured" (or, import) fleet. In fact, the rules defining "domestically manufactured" are so strict that many cars assembled in the U.S. (including all U.S.-built Japanese models) do not qualify as "domestically manufactured." The law further requires that the CAFE standard be met separately by a manufacturer's "domestic" fleet and its "import" fleet. For U.S. manufacturers, each of which has two fleets under this rule, the two fleets cannot be averaged together for compliance purposes. In contrast, the Japanese companies average their small cars with their largest cars, because they don't have any cars that meet the strict "domestic" content rules. This provision hurts only the U.S. auto makers and U.S. autoworkers—because it encourages the export of U.S. jobs for the sole purpose of affecting the assignment of a model to "import" rather than the "domestic", fleet. Obviously, this result would have *no* impact on the fuel efficiency of the model, but would have significant adverse effects on the employment status of the U.S. autoworkers employed to construct that car model or its parts. In previous fuel economy rulemaking proceedings, the Department found that the 27.5 mpg standard posed a significant threat to U.S. jobs by encouraging manufacturers to ship jobs out of the country solely for CAFE compliance.

In these previous rulemaking decisions, the agency also found that the auto manufacturers had made reasonable plans to achieve the statutory standard, but that these plans had been derailed for reasons outside the control of the manufacturers. Based on new information suggesting that economic dislocations could occur if the statutory standard of 27.5 mpg is retained for MY 1989 and 1990, the agency has opened this proceeding to ascertain the magnitude of the threatened economic dislocations and the reasons for them. The Department is particularly concerned about whether the statutory standard significantly threatens U.S. jobs or the competitiveness of the U.S. auto industry. Finally, the Department is seeking comment on whether the Department will be able to find again that a substantial share of the market made reasonable efforts to achieve the statutory standard.

If the Department decides to amend the standard, the amendment must be set at the "maximum feasible average fuel economy level." Section 502(e) of the Act requires the agency to consider four factors in determining that level: technological feasibility, economic practicability, the effect of other Federal standards on fuel economy, and the need of the nation to conserve energy. Another focus of this proposal is a request for information and comments concerning the maximum feasible CAFE level.

II. Background

A. Corporate Average Fuel Economy Statutory Provisions

In December 1975, during the aftermath of the energy crisis created by the oil embargo of 1973–74, Congress enacted the Energy Policy and Conservation Act (EPCA). One provision of EPCA established an automotive fuel economy regulatory program and was added as a new Title V to the existing Motor Vehicle Information and Cost Savings Act (the Act, 15 U.S.C. 2001 *et seq.*). The program includes corporate average fuel economy (CAFE) standards for passenger automobiles.

Title V specified CAFE standards for passenger automobiles of 18, 19, and 20 mpg, for MYs 1978, 1979, and 1980, respectively. The Secretary of Transportation (as delegated to the NHTSA Administrator) was required to establish standards for MYs 1981–1984. For MY 1985 and thereafter, Title V specifies a standard of 27.5 mpg.

Under the Act, the agency has discretion, in certain circumstances, to amend the 27.5 mpg standard. Section 502(a)(4) provides that the standard for MY 1985 or any year thereafter may be amended to a level which the agency determines is the "maximum feasible average fuel economy level" for the model year in question. In determining maximum feasible, the agency is required by section 503(e) of the Act to consider the following four factors: (1) Technological feasibility; (2) economic practicability; (3) the effect of other Federal motor vehicle standards on fuel economy; and (4) the need of the Nation to conserve energy.

While compliance with fuel economy standards is determined by averaging the various models produced by each manufacturer, enabling them to produce vehicles with fuel economy below the level of the standard if they produce sufficient numbers of vehicles with fuel economy above the level of the standard, manufacturers may not average their imported cars together with their domestically manufactured cars. Instead, manufacturers must meet fuel economy standards separately for their imported and domestically manufactured fleets. (See section 503 of the Act.) Cars are considered to be domestically manufactured if they have at least 75 percent domestic content. Conversely, cars are considered to be imports, or as the statute characterizes them, "not domestically manufactured," if they have less than 75 percent domestic content. One result of this provision is that domestic automakers are unable to take advantage of the higher fuel economy of smaller imported vehicles which they sell, for purposes of CAFE compliance of their domestic fleets.

While a separate fuel economy standard is set for each model year, the Cost Savings Act does not require absolute achievement of the standard by manufacturers within each year. Instead, it allows a shortfall in one year (or years) to be offset if a manufacturer exceeds the standard for another year (or years). Under the Act, as amended by the Automobile Fuel Efficiency Act of 1980, manufacturers earn credits for exceeding average fuel economy standards which may be carried back for three model years or carried forward for three model years. If a manufacturer still does not meet the standard, after taking credits into account, it has committed "unlawful conduct" under section 508 of the Act, and is liable to the Federal government for civil penalties.

In recent years, the Department increasingly has become aware of—and concerned by—the discriminatory effects and adverse impacts of the CAFE program, and of its marginal relevance to *real* fuel economy. On August 5, 1987, the Secretary of Transportation submitted to Congress draft legislation that would repeal the corporate average fuel economy standards for new model years. The bill would also retain and update the Environmental Protection Agency's (EPA) fuel economy labeling requirements, and revise EPA's automotive fuel economy testing procedures to require that results simulate conditions of actual use. The legislation was proposed in light of a number of considerations, including the fact that the energy conservation goals that Congress sought to achieve by the CAFE program largely have been realized. Another is the growing view of economic thought that the decontrol of the price of oil and changes in gasoline prices, rather than CAFE standards, were primarily responsible for the increase in fuel efficiency over the past decade. The nation might well have achieved similar results simply through the natural operation of the market.

Moreover, it is clear that CAFE standards can cause serious economic distortions in the marketplace. For example, while the standards exert pressure on manufacturers to sell a mix of vehicles to meet the required CAFE level, they do nothing to ensure that consumers will want to buy the mix the manufacturers offer. Indeed, if standards are set at too high a level, the manufacturers may be able to meet the standards only by restricting the sale of their larger (domestically produced) vehicles and engines, resulting in the loss of American jobs and less choice for consumers. The law also provides perverse incentives for domestic carmakers to move parts and assembly jobs for larger cars out of the United States, just so those vehicles can be shifted from the "domestic" to the "imported" fleet. Also, CAFE standards place the full-line U.S. automakers at a competitive disadvantage, as compared to other producers who specialize in smaller vehicles. As a result, domestic manufacturers may be forced to restrict sales of their larger, less fuel efficient vehicles. Import manufacturers who are not constrained by the CAFE standards simultaneously are entering this market segment, which long has been dominated by domestic manufacturers. The Secretary noted that there is strong evidence that the market will continue to provide the proper balancing of fuel-efficient vehicles versus other vehicle characteristics such as size, safety, and performance, and concluded that the most sensible public policy is to repeal the CAFE standards program.

Unfortunately, the Congress has not yet taken any action on the Department's legislative proposal. Unless and until the draft legislation becomes law, NHTSA must continue to administer the law as it is currently written, and as it has been construed by the courts. Thus, today's notice is based on the existing law.

B. Setting the 1981–84 Standards

On June 30, 1977, NHTSA published in the **Federal Register** (42 FR 33534) a final rule establishing the MYs 1981–1984 passenger automobile CAFE standards. The selected standards were 22.0 mpg for 1981, 24.0 mpg for 1982, 26.0 mpg for MY 1983 and 27.0 mpg for MY 1984.

As part of establishing the 1981–1984 standards, the agency developed estimates of the maximum feasible fuel economy for each manufacturer for MYs 1981 through 1985. The agency's conclusion at that time was that "levels of average fuel economy in excess of 27.5 mpg are achievable in the 1985 time frame." 42 FR 33552 The agency believed that it was feasible for GM to achieve an average fuel economy level of 28.9 mpg in MY 1985, Ford 27.9 mpg and Chrysler 28.7 mpg. See 1977 Rulemaking Support Paper (RSP), p. 5–38 (Table 5.11). Those levels were based on a number of assumptions, including the ability of manufacturers to maintian a rapid rate of introduction of technology, consumer acceptance of a 10 percent reduction in vehicle acceleration, and significant use of a widespread range of technological options, including weight reduction, improved transmissions and lubricants, reduced aerodynamic drag, reduced accessory losses and reduced tire rolling resistance.

The agency's estimates did not assume a downward mix shift in automobile sizes or the use of diesel engines. The agency concluded that a standard set at a level that required substantial mix shifts would not be economically practicable due to the risk that a signficant number of consumers might defer purchasing new automobiles, resulting in a substantial sales drop. However, these techniques were viewed in the 1977 rule as "constituting a safety margin" for manufacturers in the event that other technological improvements did not result in sufficient CAFE improvements. 42 FR 33545, June 30, 1977.

As to foreign manufacturers, the 1977 RSP projected that all but three of them could improve their average fuel economy levels, without expanded use of diesel engines, sufficiently to meet the 27.5 mpg standard. With fleet fuel economy improvements from additional diesels included in the foreign fleet projections, only one manufacturer, Mercedes, was projected to fall below the 1985 standard.

It should be emphasized that the agency's 1977 estimates were intended to demonstrate the feasibility of achieving the 27.5 mpg standards and not to predict what specific actions the manufacturers would actually take to achieve the standard. The agency's estimates were based on one scenario of what the agency believed manufacturers could do to achieve an average fuel economy level of 27.5 mpg by 1985. Manufacturers were free to pursue other courses of action to achieve the 27.5 mpg fuel economy level.

C. Events from 1977 to 1984

In January 1979, NHTSA presented new feasibility estimates for each manufacturer for MYs 1980 through 1985 in its Third Annual Report to the Congress on the Automotive Fuel Economy Program (44 FR 5742, January 29, 1979). The agency stated that "(o)n balance, the conclusions reached during the 1981–84 rulemaking * * * are similar to those resulting from the most recent assessments. These assessments indicate that all domestic manufacturers can exceed the scheduled standards for each year through 1985." 44 FR 5757.

Between January and May of 1979, NHTSA received a number of submissions from Ford and General Motors on the 1981–1984 fuel economy standards for passenger automobiles asserting that those standards should be reduced. In response to these submissions, the agency published a document entitled "Report on Requests by General Motors and Ford to Reduce Fuel Economy Standards for MY 1981–85 Passenger Automobiles," DOT HS–804 731, June 1979. The report concluded that the standards were technologically feasible and economically practicable and noted that both companies had submitted product plans for meeting the standards. Report, p. 14.

One year later, the Nation was in the midst of another energy crisis, brought on by events in Iran. Gasoline prices were rising rapidly, creating significantly increased consumer demand for small cars. The U.S. city average retail price for gasline rose from 88 cents per gallon in 1979 to $1.22 in 1980. (In 1986 dollars, this increase was from $1.33 in 1979 to $1.63 in 1980.) In light of these changed conditions, the industry announced plans to significantly exceed the 27.5 mpg standard for 1985. Both Ford and GM, as well as Chrysler and American Motors (now a part of Chrysler), indicated that they expected to achieve average fuel economy in excess of 30 mpg for that model year. Product plans submitted to NHTSA by those companies indicated that the projections assumed significant mix shift toward smaller cars and rapid introduction of new technology.

On January 26, 1981, NHTSA published an advance notice of proposed rulemaking (ANPRM) in the **Federal Register** (46 FR 8056) which addressed the issue of passenger automobile fuel economy standards for MY 1985 and beyond. That notice and an accompanying paper entitled "Analysis of Post-1985 Fuel Economy," assumed that manufacturers would achieve their announced average fuel economy goals of over 30 mpg for 1985.

On April 16, 1981, NHTSA published in the **Federal Register** (46 FR 22243) a notice withdrawing the ANPRM. The notice stated that "(t)his action is being taken in recognition of market pressures which are creating strong consumer demand for fuel-efficient vehicles and sending clear signals to the vehicle manufacturers to produce such vehicles. It is expected that the market will continue to act as a powerful catalyst * * *."

Conditions affecting fuel economy changed dramatically after 1981, following completion of decontrol of domestic oil and other external factors increasing available supplies. Gasoline prices did not continue to rise but instead declined over time. This, combined with economic recovery, caused consumer demand to shift back toward larger cars and larger engines. Data submitted to the agency by GM and Ford in mid-1983 indicated that instead of achieving fuel economy well in excess of the 27.5 mpg standard for MY 1985, they would be unable to meet the levels prescribed by the standard.

D. Rulemakings to Amend the MYs 1986–1988 CAFE Standards

In response to petitions from GM and Ford, the agency exercised its discretion and lowered the MY 1986 and MY 1987–88 passenger automobile CAFE standards in two separate rulemakings. (For MY 1986, see 50 FR 40528, October 4, 1985; for MYs 1987–88, see 51 FR 35594, October 6, 1986.) (The agency denied petitions by Mercedes-Benz and GM to amend retroactively the MYs 1984–85 passenger automobile CAFE standards. (See 53 FR 15241, April 28, 1988.))

The rulemaking reducing the MYs 1986–1988 CAFE standards were consistent with the Cost Savings Act and its legislative history which clearly indicate that NHTSA has the authority to reduce fuel economy standards. The determination of maximum feasible

average fuel economy level is made as of the time of the amendment. The agency has emphasized, however, that it could not reduce properly a standard under the Act if a current inability to meet the standard resulted from manufacturers previously declining to take reasonable steps to improve their average fuel economy as required by the Act.

For MY 1986, the agency evaluated the manufacturers' past efforts to achieve higher levels of fuel economy as well as their immediate capabilities. Based on the information received, the agency concluded that Ford and GM, constituting a substantial part of the industry, had taken or planned appropriate steps to meet the 27.5 mpg standard in MY 1986 and made significant progress toward doing so, but were prevented from fully implementing those steps by unforeseen events. The decline in gasoline prices, which began in 1982, had been expected to be temporary and quickly reverse, but instead continued. The agency concluded that, among other things, there had been a substantial shift in expected consumer demand toward larger cars and engines, and away from the more fuel-efficient sales mixes previously anticipated by GM and Ford. The agency's analysis indicated that this shift was largely attributable to the continuing decline in gasoline prices and that the only actions available to those manufacturers to improve their fuel economy in the remaining time for MY 1986 would have involved product restrictions likely resulting in significant adverse economic impacts, including sales losses well into the hundreds of thousands and job losses well into the tens of thousands, and unreasonable restrictions on consumer choice. That action was recently upheld by the D.C. Circuit Court of Appeals as consistent with the provisions of the Act and within the agency's discretion. (*Public Citizen* v. *National Highway Traffic Safety Administration*, 848 F. 2d 256, 264 (D.C.Cir. 1988)

The agency also lowered to 26.0 mpg the standards for MYs 1987–88. In this case as well, the agency determined that manufacturers had made reasonable efforts at compliance, but that these efforts had been overtaken by unforeseen events, whose effects could not be overcome by available means within the time available. NHTSA stated: "* * * both GM and Ford have continued to make significant technological improvements in their fleets and have had reasonable plans to meet CAFE standards. In a situation where unforeseen events, including changes in consumer demand or changes in the competition's product offerings, overtake a manufacturer's reasonable product plan, the agency does not consider it consistent with the Act to "hold" the manufacturer to carrying out a product plan that has become economically impractical." (51 FR 35611)

In evaluating the reasons for GM's and Ford's declining MYs 1987–88 CAFE projections, the agency noted that the companies appeared to be applying the same technologies as planned in late 1983. In the case of GM, NHTSA stated that the two major reasons for the decline in GM's CAFE projections were net engine and model mix shifts, and engine and transmission improvement programs not yeilding projected gains. The great majority of the factors reducing Ford's CAFE projections were due to net shifts in projected sales for models and engines, engine efficiency improvements not yielding projected gains, and new models not meeting initial weight targets. The agency thus concluded that the major reasons for the decline in both GM's and Ford's MYs 1987–88 CAFE projections were largely beyond those companies' control. (51 FR 35610) NHTSA's analysis further indicated that the only actions then available to those manufacturers to raise the fuel economy in their domestic fleets to 27.5 mpg in MYs 1987–88 would involve a combination of (1) product restrictions likely resulting in significant adverse economic impacts, including substantial job losses and sales losses and unreasonable restrictions on consumer choice, and (2) transfer of the production of large cars outside of the United States, thereby costing American jobs, while having absolutely no energy conservation benefits. (51 FR 35594)

III. Petitions To Amend the Model Year 1989 and 1990 CAFE Standards

The agency received five petitions to amend the passenger car CAFE standards for MYs 1989 and 1990. All petitions seek rulemaking to lower those CAFE standards, with four of the petitions requesting a lower standard based on the reported prospective inability of automobile manufacturers to meet the statutorily set standard of 27.5 mpg. The fifth petition requests a lower standard based on the contention that the CAFE program has caused an increase in motor vehicle fatalities. A brief summary of each petition follows.

A. Manufacturer Petitions

Automobile Importers of America, Inc.

On February 12, 1988, the Automobile Importers of America, Inc. (AIA) petitioned the agency to reduce the passenger automobile CAFE standards to 26.0 mpg for MYs 1989 and 1990. (Docket No. PRM–FE–011; supplemented May 25, 1988, Docket No. PRM–FE–011A) AIA represents 19 automobile importers, including BMW, Fiat/Alfa Romeo, Honda, Hyundai, Isuzu, Jaguar, Mazda, Mitsubishi, Nissan, Peugeot, Porsche, Renault, Rolls-Royce, Saab-Scania, Subaru, Suzuki, Toyota, Volvo and Yugo. The basic thesis of the AIA petition is that the 27.5 mpg CAFE standard for MYs 1989 and 1990 is technologically infeasible and economically impracticable under Title V, because it will unduly restrict consumer choice. AIA states that there is no evidence that the situation which caused NHTSA to amend the MYs 1986–1988 CAFE standards, i.e., high consumer demand for better performing cars with more features, will not continue for 1989 and 1990 as it has in previous years.

The focus of the AIA petition is the fuel economy abilities of the single- and limited-line manufacturers, who, according to AIA, lack one crucial advantage of the American full-line manufacturers. They do not have a wide variety of sizes of smaller cars to average against their larger, higher performance cars. AIA also argues that these manufacturers have been at the forefront of implementing technological advances, including those that improve safety and fuel economy. However, AIA states that many of the safety advances pioneered by these manufacturers, such as antilock brakes and airbags, have a negative effect on fuel economy.

In addition, AIA makes several other points in support of its request to lower the standards. First, AIA states that the resultant savings from a CAFE standard of 27.5 mpg compared to those from a standard of 26.0 mpg would be equal to approximately one-tenth of one percent of all motor vehicle fuel consumed in the United States during 1986. Second, the group argues that the goals of EPCA have already been met, because the entire fleet of automobiles exceeds 27.5 mpg. Third, AIA says that the single-line or limited-line manufacturer is at a disadvantage with too-stringent CAFE standards. Since such a manufacturer does not sell smaller cars, it does not have the option of refusing to sell larger cars or of providing incentives for smaller cars.

Austin Rover

Austin Rover Group Limited petitioned the agency on March 8, 1988, to reduce the passenger automobile CAFE standards to 26.0 mpg for MYs

1989 and 1990. Austin Rover, in collaboration with Honda Motors, produces the Sterling automobile for sale in the United States. Austin Rover's basis for petitioning is that it is a single-line manufacturer of "executive class" automobiles, with no smaller models to offset the lower fuel economy of the executive class automobiles. Austin Rover's petition includes a listing of the various engine and vehicle parameters said to have been optimized for fuel economy. (Austin Rover is not a member of AIA.)

Mercedes-Benz of North America, Inc.

On March 16, 1988, Mercedes-Benz of North America (Mercedes) petitioned the agency to reduce the passenger automobile CAFE standard for MY 1989 and later model years to 22.0 mpg. Mercedes believes that this is the maximum achievable level, in the near term by most limited-line manufacturers which operate in a restricted market segment. (Mercedes is not a member of AIA.)

Mercedes' main argument is that limited-line manufacturers such as Mercedes have taken all steps necessary to reduce the fuel consumption of the vehicles they produce, and that the source of their inability to comply is the narrow market which they serve. Mercedes urges NHTSA, in setting the new CAFE standard for model year 1989 and beyond, to recognize that a manufacturer's ability (or failure) to comply depends primarily on the nature of consumer demand for its products.

Mercedes urges the agency to lower the standard, stating that NHTSA should not keep the standard at 27.5 mpg when it knows that the standard cannot be achieved by limited-line manufacturers such as Mercedes. Mercedes says that a CAFE standard set above the capabilities of a particular segment of the market is an anti-competitive regulation and strongly suggests that, accordingly, NHTSA has a statutory obligation to revise the standard for MY 1989 and beyond.

General Motors

On May 17, 1988, General Motors Corporation (GM) submitted a petition requesting the agency to amend the MYs 1989 and 1990 passenger car CAFE standards to the maximum feasible level. The GM petition did not provide specific data to support its request; instead, the petition indicated support of the petitions previously filed, endorsed the opening of rulemaking to establish the maximum feasible level for MYs 1989 and 1990, and referred the agency to GM comments submitted in connection with the AIA petition, and in connection with the agency's amendment of the MY 1986 and MYs 1987–88 passenger car standards.

B. CEI Petition

Competitive Enterprise Institute

The Competitive Enterprise Institute (CEI) petitioned the agency on April 11, 1988, to set the passenger automobile CAFE standard for MYs 1989 and 1990 at 24.0 mpg. CEI is the only petitioner whose request to reduce the CAFE standards is not based on arguments that some manufacturers currently are unable to meet the standards. Instead, CEI contends that the CAFE program is causing an increase in vehicle occupant fatalities and that a CAFE of 27.5 mpg for MY 1989 will result in increased deaths of 2,200 to 3,900 over the life of that year's fleet. Further, CEI asserts that neither Congress nor the agency consciously considered the possible adverse safety side effects of CAFE standards, and that the agency is therefore without power to adopt standards until it makes a specific finding that the savings in fuel is worth the increase in highway fatalities. CEI contends that 24.0 mpg is what the average new car fuel economy would be if there were no CAFE regulatory program, and uses this assumption as the basis for promoting 24.0 mpg as the appropriate level to set.

IV. Summary of Agency Response to Petitions

In reviewing the manufacturers' petitions to lower the CAFE standards for MYs 1989–90, the agency has attempted to apply the analytical approach it spelled out in the decisions to amend the standards for MYs 1986–88. Accordingly, the agency published a request for comments relating to the petitions (53 FR 8668, March 16, 1988) and followed up with specific information requests to several manufacturers. The purpose of this activity was to obtain information to allow the agency to assess the reasonableness of the manufacturers' efforts to achieve the 27.5 mpg statutory standard and to ascertain the maximum feasible fuel economy levels for MYs 1989 and 90. The initial responses to the notice and those requests were not sufficient to permit the agency to attempt to assess the reasonableness of manufacturer efforts to achieve the 27.5 mpg statutory standard. Recently, however, GM supplied information to NHTSA that is sufficient to permit the agency to go forward with this proposal. (All publicly available material supplied by GM is in the docket in this proceeding.) For purposes of a possible final rule, the agency will complete its analysis of GM's submissions, both as to whether they are sufficient for the agency to make a determination concerning the reasonableness of that company's efforts and, if so, whether GM in fact made reasonable efforts to meet the statutory standard for MYs 1989–90. This proposal will permit manufacturers and others to present data, views and arguments about retaining or reducing the standard. Accordingly, it requests information and comment from all interested persons on manufacturers' reasonable efforts and maximum feasible fuel economy levels.

As the agency set forth clearly in the decisions to reduce the MYs 1986–88 standards, NHTSA does not believe it can properly lower the statutorily set standard of 27.5 mpg unless it first can make a determination that manufacturers have made reasonable efforts to attain the standard. If the agency makes such a determination in this instance, it will analyze the industry's maximum feasible CAFE level, and adopt a standard in the range of 26.5 mpg to 27.5 mpg. As discussed more fully below, NHTSA believes the lower end of the range, 26.5 mpg, is appropriate given the agency's longstanding interpretation of the statutory requirement that standards be set at the "maximum feasible" level, taking industrywide considerations into account, and the CAFE projections and recent CAFE performance of manufacturers whose sales (individually or combined) represent a substantial share of the market. The high end of the range, 27.5 mpg, represents the current level of the standard.

With regard to CEI's petition, the agency seeks comment on the issues raised in the petition, as discussed later in this preamble.

V. Agency Analytical Approach in Amending Standards

When it adopted EPCA, Congress established a long-term obligation on the part of manufacturers to bring their fleets into compliance with the 27.5 mpg standard and provided for civil penalties for the failure to do so. While Title V provides no express guidance concerning the appropriate circumstances for the exercise of its discretion to amend, the agency has been guided by the purposes of EPCA and by the statutory scheme of Title V. As the agency has explained in its rulemaking actions lowering the MYs 1986–88 standards, it believes that the exercise of its discretion consistent with those factors is required by the

provision in the Administrative Procedure Act stating that an agency's discretionary decision will be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (5. U.S.C. 706(2)(A))

For petitions requesting a reduction in an existing CAFE standard, the agency has stated previously that it would not lower the 27.5 mpg standard unless the agency could conclude both that the manufacturers have made reasonable efforts to comply with the prescribed standard *and* that the 27.5 mpg standard is above the "maximum feasible" level for the industry.

In administering the fuel economy program, NHTSA must take into account "industrywide considerations". This phrase also has been discussed in several previous documents. In its petition to lower the MYs 1989–90 standards, Mercedes proffered another interpretation of this term, to include European manufacturers, as a significant segment of the industry. The issue of industrywide considerations has been addressed on many previous occasions, and most recently in the April 26, 1988 agency denial of petitions to amend retroactively the MYs 1984 and 1985 passenger automobile CAFE standards. The agency reiterates its position below:

The CAFE statute requires that, for each model year, there be a single standard for all passenger automobile manufacturers not exempted under section 502(c). Section 502 does not state expressly whether the concept of feasibility is to be determined in setting passenger automobile standards on a manufacturer-by-manufacturer basis or on an industrywide basis. The agency has therefore long interpreted this section in a manner that is consistent with the legislative history of Title V. The conference report accompanying Title V states, with respect to determining the maximum feasible average fuel economy level:

Such determinations should therefore take industrywide considerations into account. For example, a determination of maximum feasible average fuel economy should not be keyed to the single manufacturer which might have the most difficulty achieving a given level of average fuel economy. Rather, the [Administrator] must weigh the benefits to the nation of a higher average fuel economy standard against the difficulties of individual automobile manufacturers. Such difficulties, however, should be given appropriate weight in setting the standard in light of the small number of domestic automobile manufacturers that currently exist, and the possible implications for the national economy and for reduced competition association (sic) with a severe strain on any manufacturer. However, it should also be noted that provision has been made for granting relief from penalties under section 508(b) in situations where competition will suffer significantly if penalties are imposed. (S. Rep. No. 94–516, 94th Cong., 1st Sess. 154–5 (1975))

This language expresses two themes: first, a Congressional goal of improved fuel economy for the nation and second, fuel economy standards which are set at the maximum feasible level. NHTSA has construed this language many times. For example, as the agency stated in the 1977 notice establishing the MYs 1981–84 standards for passenger automobiles, Congress did not intend that standards simply be set at the level of the single least capable manufacturer. Setting standards in that fashion would have vitiated the CAFE program. This point can be illustrated by considering the effects of setting a standard at 19.0 mpg, based on the capability of a single manufacturer with a market share of less than one percent. Such a standard would have no possible impact on the balance of the manufacturers which, together produce more than 99 percent of all cars and have higher average fuel economies.

Since this initial interpretation, the agency has expanded its position, noting that the statute contemplated that standards should not be set above the capability of manufacturers whose sales represent a substantial share of the market. (50 FR 29912, 29923) This would apply either to a single larger such manufacturer or to a combination of smaller manufacturers constituting together a substantial share of the market. In the final rule reducing the MYs 1987–88 standards, the agency concluded that the particular compliance difficulties of several of the European manufacturers, whose combined market share is relatively small, was not legally sufficient to justify a standard set for below the capabilities of the other manufacturers. (51 FR 35617)

The agency does not believe that Congress intended the CAFE standards to be governed by the abilities of a single, narrow segment of the industry, such as the projected 0.8 percent market share of Mercedes in MY 1988, or even the 6.7 percent combined market share of European manufacturers in that model year. (It also should be noted that the 6.7 percent reflects all European manufacturers; 3.2 of those 6.7 percentage points represent European manufacturers that already achieve or exceed 27.5 mpg, i.e., Volkswagen/Audi and Yugo.)

This statement is not intended as criticism of those manufacturers for not achieving 27.5 mpg CAFE, or as lack of appreciation for the difficulty caused to them by the CAFE program. On the contrary NHTSA believes that regulation of fuel economy by a single standard to be met on a corporate average basis—as required by Title V—is unfair to many manufacturers which produce larger cars (including full-line U.S. manufacturers as well as limited-line European producers). The burdens of the program fall entirely on the manufacturers which produce larger or higher performance cars, especially if they also do not have sufficient smaller or lower-performance cars that can be averaged into the same fleet. Other manufacturers, including a number of major importers, are, as a practical matter, not required to take any actions to improve fuel economy or change product offerings. Moreover, these other manufacturers can produce smaller and mid-size cars that compete against those of the full-line manufacturers, without concern as to how much fuel economy technology is incorporated in the cars. This results in a potential cost advantage for these manufacturers—and a competitive disadvantage for the companies that also produce larger cars. This overall issue is one of the reasons NHTSA has recommended repeal of the CAFE program. Unfortunately, the Act does not permit the agency to set the standard based on the discriminatory impact on a small portion of the market, even though the agency is keenly aware of the practical problems it presents to many manufacturers.

Clearly, NHTSA's decade of consistent interpretation of the statutory scheme cannot be abandoned without good cause, and the agency is not persuaded that Mercedes' petition demonstrates that the agency's consistent interpretations are erroneous. While the agency appreciates the frustration of the limited-line manufacturers which believe that they have achieved their own individual maximum feasible levels of fuel economy and still fall short of the CAFE standard, it notes that the manufacturers are pursuing an administrative solution to a legislative problem. These manufacturers really are alleging that they can *never* meet the statutorily set standard of 27.5 mpg, due to the market segment in which they compete. This, however, is inherent in a statutory scheme in which single standards must be set on the basis of the entire industry, but met by individual manufacturers. In

this case, the appropriate solution to the dilemma faced by these manufacturers can be obtained only from Congress, not from NHTSA.

NHTSA believes that the approach regarding "industry-wide" considerations used in its determinations of "maximum feasible" also is appropriate in its determination of reasonable efforts. Accordingly, the agency believes that it is inappropriate to base a determination of reasonable efforts or maximum feasible level solely on any market segment which does not represent a substantial share of the industry. For this reason, in today's analyses, the agency principally considered the efforts of Ford and GM, since either of their sales represents a substantial share of the market.

VI. Reasonable Efforts Analysis

A key issue in deciding whether to exercise its discretion to amend the statutorily set CAFE standard for passenger automobiles of 27.5 mpg is a determination by the agency that manufacturers have made reasonable efforts to meet the standard. The agency has explained its reasonable efforts analysis in several previous documents, including the rulemakings lowering the MY 1986 and MYs 1987–1988 passenger automobile CAFE standards and the document denying the petitions by Mercedes and GM to amend the MY 1984 and 1985 passenger automobile CAFE standards. (For MY 1986, see 50 FR 40528, October 4, 1985; for MYs 1987–1988, see 51 FR 35594, October 6, 1986; for the petition denial for MYs 1984–1985, see 53 FR 15241, April 28, 1988.) Because this determination is critical to the agency's decision whether or not to amend the CAFE standards for MYs 1989 and 1990, the agency repeats its rationale below.

The agency sees the determination of reasonable efforts as a necessary step to amending a given year's CAFE standard. Since Title V imposed a long-term obligation on manufacturers to achieve a 27.5 mpg fuel economy level, the agency could not properly exercise its limited statutory discretion to amend the standard if the current inability to meet the standard resulted simply from manufacturers previously declining to take steps needed to improve their average fuel economy as required by the Act. Therefore, the agency must evaluate the manufacturers' past efforts to achieve higher levels of fuel economy, as well as their current capabilities.

The agency's evaluation of the reasonableness of manufacturer efforts is not only a prudent but also a necessary step. To reduce a standard notwithstanding the absence of reasonable efforts would be an abuse of discretion i.e., beyond the agency's limited administrative authority under the Act. In its recently-issued opinion upholding NHTSA's reduction of the MY 1986 CAFE standard for passenger automobiles and citing approvingly the "reasonable efforts" test, the Court of Appeals for the D.C. Circuit said that "(l)owering the standard whenever the larger manufacturers assert current inability to meet that standard would, without doubt, completely vitiate the statutory scheme." *Public Citizen* v. *National Highway Traffic Safety Administration*, 848 F. 2d 256, 264 (D.C.CIR. 1988).

In reviewing the current requests to lower the standard, the agency needs to analyze the statements and actions of the manufacturers particularly carefully, in view of the amount of time which has passed since the events which led to the reduction of the MYs 1986–88 CAFE standards for passenger automobiles (i.e., the unexpected decline in gasoline prices during the early 1980's, leading to increased consumer demand for larger, more powerful, less fuel-efficient vehicles). The significance of the increasing length of this interval of time was noted in *Center for Auto Safety, et al.* v. *Thomas*, a recent case considered by the full D.C. Circuit Court sitting *en banc* concerning EPA's adjustments to the formula for computing manufacturers' actual CAFE levels. In that case, one-half of the evenly-split court observed: "Whatever the barriers to changing MY 1987 and 1988 vehicles as of August 20, 1985, it is uncontested that, MY 1990 and MY 1991, the auto manufacturers could have redesigned their vehicle offering to enhance fuel economy." 847 F. 2d 843, 858 (D.C.Cir. 1988) (per curiam).

In evaluating the manufacturers' past efforts to achieve compliance with a standard of 27.5 mpg consistent with section 502(e) of the Cost Savings Act, and as noted in the two previous rulemakings lowering the 27.5 mpg standard, the agency does not consider it appropriate to judge each and every manufacturer product action by 20–20 hindsight. Instead, the agency reviews the manufacturers' fuel economy efforts in light of "the information available to manufacturers at the time product decisions were being made."

For MY 1986, and again for MYs 1987–88, the agency determined that GM and Ford had plans adequate to meet the 27.5 mpg standard, but that these plans were overtaken by unforeseen events in the early 1980's. The agency identified a number of factors which led to lower than expected CAFE levels, including the dropping price of gasoline and a related increase in expected consumer demand for larger and more powerful cars. The agency concluded that the manufacturers did not have time to offset the impact of these unexpected events by developing and implementing supplementary or alternate plans for meeting the CAFE standard of 27.5 mpg for MYs 1986–88.

The agency also noted in both the MY 1986 rulemaking and the MYs 1987–88 decision that Title V contemplates that manufacturers would have to adopt intensified and/or supplementary methods of compliance in the event that previous plans were unsuccessful. The fact that adequate plans had been overtaken by unforeseen events in the early 1980's was only a temporary justification for not achieving the long-term 27.5 mpg CAFE goal set by Congress. The agency noted in these previous determinations that in view of the statutory program of mandatory maximum feasible standards:

> Manufacturers had an obligation to take whatever steps were necessary consistent with the factors of section 502(e). (My 1986 final rule, 50 FR 40528)
>
> On the other hand, as it becomes apparent that additional application of technology, such as further penetration of front-wheel drive or additional use of material substitution, is necessary to meet CAFE standards, manufacturers must initiate efforts to redesign and replace their older cars as necessary to meet such standards. (51 FR 35594, 35611)
>
> The agency also emphasized that while changes in product plans which may, as an unintended effect, reduce CAFE, are consistent with the statutory criteria to the extent that they reflect changes in what is economically practicable, manufacturers recognizing the consequences of such changes must then pursue additional means, consistent with the factors of section 502(e), to meet the standards. (MY 1987–88 rulemaking, referring to and affirming the analysis in the MY 1986 rulemaking, 51 FR 35594, 35600)

Given the passage of time since those unforeseen events in the early 1980's, coupled with the agency's understanding of traditional auto industry leadtimes to introduce new technologies or new vehicles, the agency could not reasonably base an exercise of its discretion to amend the MY 1989–90 standards on the same set of facts that supported the reduction of the MY 1986–88 standards. The agency will need to know whether, and to what extent, the industry as a whole made new reasonable plans to comply with the 27.5 mpg standard after the unanticipated events of the early 1980's derailed the previous plans.

To help it assess the reasonableness of manufacturer efforts, the agency

published a fuel economy questionnaire in the **Federal Register** (March 16, 1988, 53 FR 8668) and mailed copies of the questionnaire to nine manufacturers, both domestic and import. NHTSA subsequently sent follow-up questions to six manufacturers. The questions asked for, among other items, specific explanations of what events had occurred or circumstances had changed to create a compliance problem now. The agency asked manufacturers to provide a description of specific actions taken to achieve 27.5 mpg in MY 1989 and beyond, the impact of those actions, and why the original assessment of these actions is no longer valid.

The initial responses did not provide sufficient information for NHTSA to attempt to assess the reasonableness of manufacturer compliance efforts. However, in early August, GM (which constitutes a substantial share of the industry) provided a considerable amount of additional information and arguments on this issue, the public version of which is in the docket of this proceeding. The agency has not completed its analysis of the new GM materials. However, NHTSA has concluded that GM provided sufficient information for the agency to go forward with rulemaking, including seeking public comment on GM's arguments. As indicated above, for purposes of a possible final rule, the agency will complete its analysis of GM's submissions, both as to whether they are sufficient for the agency to make a determination concerning the reasonableness of that company's efforts and, if so, whether GM in fact made reasonable compliance efforts under the statute. Of course, all other submissions and arguments received during the comment period will be analyzed as well.

GM's arguments can be summarized as follows. That company states that at all times it has made plans to comply with the legislated 27.5 mpg standard, but those plans have been overtaken by unforeseen events beyond its control. According to GM, just as events in the early and mid-1980's overwhelmed its expectation that it would meet the 27.5 mpg standard in 1986–88, similar events, including an uprecedented precipitous 28 percent drop in gasoline prices over the 1986 model year (which was in addition to a 27 percent drop in gasoline prices spread between 1981 and 1985), coupled with radical changes in the competitive environment that characterized the mid- and late 1980s, have overtaken its plans for the 1989–90 time frame. More specifically, GM argues the following:

1. GM consistently planned for compliance with the 1989–90 standards. Immediately after the 28 percent drop in gasoline prices over the 1986 model year, GM could not forecast CAFE compliance without plant closings and layoffs. As prices stabilized at the lower levels, subsequent compliance planning called for long-term compliance through a continued aggressive presence in the fuel-economy conscious segments in the market and introduction of more fuel-efficient and better performing powertrains. However, given the magnitude of the gasoline price drop and the need to assure long-term competitiveness by responding to anticipated changes in consumer expectations, GM also forecast the need for some limited market-forcing actions to achieve compliance over the intermediate term, including 1989 and 1990.

2. Compliance actions were successfully implemented. In the 1986 to 1988 period, GM's compliance efforts were rewarded by a continually improved CAFE. These efforts included, for example, continued introduction of new powertrains like the 16-valve QUAD IV and 3800, and new production platforms like the Beretta and Corsica. For 1989, GM is introducing the 3300 engine which is expected to have better driveability and be more fuel efficient than its 3.0L predecessor. Additionally, GM has continued to maintain an aggressive competitive presence in the fuel-economy conscious segments of the markets.

3. Unexpectedly high CAFE levels achieved by GM in recent years result from temporary or one-time aberrations and should not be viewed as representing a new " base" or trend for future year performance. The success, which exceeded expectations, was derived in part from unanticipated fuel economy performance on EPA tests that cannot reasonably be forecast to be repeated in future model years. Other sources of aberrations from long-term expectations included an extented 1988 model year for the Beretta and Corsica which alone accounts for an estimated 0.1 mpg in MY 1988 CAFE performance. Also, beyond these aberrations, there is a downside to GM's unexpectedly high CAFE. One contributing element has been a lower than forecast level of sales of midsize, larger and luxury models owing in part to downsizing and small engine programs that, in GM's view, may have been too agressive given recent gasoline prices. This has had a very real cost in lost employment at plants like Detroit-Hamtramck that have barely sufficient demand for one shift of production of E/K bodies (e.g., Buick Riviera). Looking to the future, GM programs hope to increase sales of these vehicles and restore employment with restyling and driveability improvements, albeit while trying to minimize the CAFE penalty.

4. Changing circumstances render current 1989–90 plans impracticable. As GM entered the 1988 model year, it began to appear that previously forecast 1989 and 1990 compliance actions were no longer likely to be economically practicable risks, with GM domestic U.S. passenger car market share reduced 6.1 points from the 1986 model year. For example, previously anticipated potential market forcing actions began to appear impracticable with unexpected volume declines that led to the idling of the Leeds, Missouri, J-car assembly facility and a several month layoff of the Framingham, Massachusetts, A-car assembly facility—both despite incentive programs and attractive 1988 pricing for those vehicles. Moreover, the intensified competition now expected from foreign manufacturers and other factors leaves no room for product compromises previously thought to be acceptable.

5. GM is pursuing strategies for future compliance. Plans now under management review are expected to yield compliance with the 27.5 mpg standard in the future.

GM provided a variety of supporting materials, including explanations of why its CAFE projection declines from MY 1988 to MY 1989 and from MY 1989 to MY 1990, why it achieved higher than projected CAFE levels for MY 1986–88, and why its MY 1989–90 CAFE projections have decreased over time; discussions of compensating actions to improve 1989 CAFE after its July 1986 projection that it likely would be below 27.5 mpg, gasoline price effects on CAFE, technology improvements and cost effectiveness, and technology update; the results of a survey related to consumer demand for performance; and information about its 1989 and later model year compliance plan, including a discussion of the impacts of product restrictions, characterized by that company as "one means of assuring compliance at the cost of jobs, consumer choice and national economic harm," and its CAFE compliance planning from 1986 to the present.

NHTSA notes that Ford also provided new information in August 1988 concerning reasonable efforts. However, the information provided was insufficient for the agency to analyze whether that company made reasonable efforts to achieve 27.5 mpg in MYs 1989–

90. In particular, the agency does not have sufficient information to analyze the timing of when Ford first realized that its product plans might not result in 27.5 mpg CAFE and what compensating actions that company initiated or considered at and since that time to improve its CAFE. Depending on the comments that Ford may submit in response to this notice, the agency may, of course, be able to make such a determination for purposes of a possible final rule.

In an earlier submission, Ford indicated that its compliance with the statute would be achieved by using credits earned by exceeding the standard in other years. NHTSA notes that *if* that company decided not to make efforts to achieved 27.5 mpg in MYs 1989–90 in light of credits from other years, such a decision would be perfectly acceptable under the statute. However, if a manufacturer chooses, in light of the flexibility offered by the credit provisions, not to make the reasonable efforts necessary to achieve the level of a standard for a particular model year, it would be clearly inconsistent with the statutory scheme for the agency to then exercise its discretion to lower the standard solely on the basis of that manufacturer's inability to meet the standard.

In analyzing whether manufacturers made reasonable efforts, the agency is attempting to answer the questions which follow. NHTSA notes that manufacturers have already provided information relevent to some of the questions, as well as to some of the questions which appear later in this notice. The agency is continuing to analyze those manufacturer submissions. Copies of the manufacturer submissions are in the public docket (Docket FE–88–01, Notice 1, or Docket PRM–FE). (Information subject to a claim of confidentiality is not included in the docket versions.) NHTSA invites interested persons to submit any information which would aid the agency in answering those questions, and encourages manufacturers to expand on prior submissions if doing so would more fully address the issues raised in this notice.

1. In considering a possible reduction in the MYs 1989–90 standards, how should the agency evaluate the sufficiency of manufacturer efforts to meet the standard? If manufacturer plans are found to have been reasonable, what additional actions should be expected of them, once compliance difficulties are evident? Should the agency consider a second round of investments or product decisions to be "economically practicable" or otherwise compelled by the statute within the timeframe in question?

2. NHTSA requests information and comments concerning the plans developed by manufacturers to achieve 27.5 mpg for MY 1989–90 *after* the unexpected gasoline price reductions of the early to mid-1980's, particularly that of 1986.

3. All full-line manufacturers projected exceeding 27.5 mpg for MY 1989–90 as recently as October 1985. The agency seeks information about what changed since those projections were made, leading to lower projections for MYs 1989–90.

4. For manufacturers which once expected to achieve or exceed 27.5 mpg in MYs 1989–90 but no longer project doing so, the agency requests detailed information concerning the timing of when a possible shortfall was first recognized, the reasons for the shortfall as compared with the earlier projections, and what compensating actions were implemented, formulated, and/or considered since that time to improve CAFE. What happened to any such plans in the intervening time? If plans were formulated but not implemented, why not?

5. How is leadtime relevant to evaluating the sufficiency of manufacturer efforts to meet the standard? NHTSA notes that if a manufacturer recognized a possible shortfall in mid-1986 for MYs 1989–90, there would have been more than two years of leadtime for MY 1989 cars and more than three years of leadtime for MY 1990 cars. Was this sufficient leadtime to improve CAFE by additional technological improvements for MY 1989 and/or MY 1990? In addressing this issue, please discuss the leadtimes for making various technological changes, both for existing cars and as part of new car designs. NHTSA notes with respect to this issue that an August 15, 1988 *Automotive News* article reported that GM "says it has found a new way of developing products in as little as three years instead of the usual five years from first design rendering to Job One." Could a manufacturer have designed an all-new car, as of mid-1986, for MY 1990? If there were sufficient leadtime for MY 1989 and/or MY 1990 to make additional fuel-economy-enhancing technological improvements (whether for existing cars or as part of new car designs) and yet those changes were not made, how should the agency assess the reasonableness of not making such changes?

6. In comparing the largest domestic manufacturers, the agency notes that Ford's CAFE is currently below that of GM. For MY 1988, Ford projects CAFE of 26.4 mpg, while GM projets 27.6 mpg. What accounts for this difference? The agency seeks comments on the significance, if any, of this difference, as well as information to help the agency understand the reasons for the difference.

7. Ford's CAFE has remained relatively flat for several model years and is projected to continue to do so. What relevance, if any, does this have in analyzing whether Ford made reasonable efforts to achieve 27.5 mpg for MY 1989–90?

8. GM's MY 1988 Mid-Model Year Report projects a CAFE level of 27.6 mpg. Why is GM's CAFE projected to decline in MYs 1989–90? What relevance, if any, does this have in analyzing whether GM made reasonable efforts to achieve 27.5 mpg CAFE in MYs 1989–90?

VII. Elements of Setting a Standard

The CAFE statute requires that the agency set a standard at the "maximum feasible level", which consists of four factors: Economic practicability, technological feasibility, the need of the Nation to conserve energy, and the effect of other Federal standards. The agency has explained and weighed these factors each time it has adopted or amended a CAFE standard.

A. Need of the Nation To Conserve Energy

Since 1975, when the Energy Policy and Conservation Act was passed, this nation's energy situation has changed significantly. Oil markets were deregulated in 1981, permitting consumers to make choices in response to market signals and allowing the market to adjust quickly to changing conditions. The U.S. Strategic Petroleum Reserve (SPR) was built to ensure a supply of oil during any major supply disruption. In June 1988, the SPR contained 550 million barrels of oil, stored principally in underground caverns, that could be pumped back to the surface if needed.

1. Petroleum Imports and Prices

The United States imported 15 percent of its oil needs in 1955. The import share had reached 36.8 percent by 1975, and peaked at 46.4 percent in 1977, at a cost of $71 billion (stated in 1986 dollars). While the import share of total petroleum supply declined after that year, the cost continued to rise to a 1980 peak level of $99 billion (1986 dollars).

By 1985, the import share had declined to 28.7 percent at a cost of $52 billion (1986 dollars). In addition, imports from OPEC sources declined through 1985, from a high of 6.2 MMB/D and 70.3 percent of all imports in 1977 to 1.8 MMB/D barrels per day and 36.2 percent of imports in 1985.

Since 1985, the import share of petroleum supply has been increasing. Between 1985 and 1986, net imports rose from 28.7 percent of the U.S. petroleum supply to 34.6 percent. In 1987 that figure was 37.1 percent, and for the first six months of 1988, net imports accounted for 38.1 percent of total supply. Due to sharply lower petroleum prices, however, the value of imports declined from 1985 to 1987, from $52 billion to $43 billion (1986 dollars).

Imports from OPEC sources have also increased. Between 1985 and 1986, imports from OPEC rose from 36.2 percent of all imports to 45.6 percent. In 1987 that figure was 45.8 percent, and for the first five months of 1988, imports from OPEC accounted for 46.4 percent of all imports.

2. Continued Need for Progress

Despite the progress which has been made, both within and outside the transportation sectors of the economy, the current energy situation and emerging trends point to the continued importance of oil conservation. Oil continues to account for well over 40 percent of U.S. energy use, and 97 percent of the energy consumed in the transportation sector. While the U.S. is the second-largest oil producer, it contains only four percent of the world's proved oil reserves. Moreover, proved reserves have declined from a peak of 39.0 billion barrels in 1970 to 26.9 billion barrels in 1986.

According to 1987 Energy Information Administration (EIA) projections, domestic production is expected to decline from 10.0 MMB/D in 1987 to between 8.3. and 9.3 MMB/D in 1995 and between 7.9 and 9.1 MMB/D in 2000, depending on the price of oil. (Data available for the first six months of 1988 indicate domestic production at 9.94 MMB/D.) Net imports are projected to increase from 5.9 MMB/D in 1987 to between 7.4 and 10.5 MMB/D in 1995 and between 7.6 and 11.7 MMB/D in 2000. Thus, as a percentage of total U.S. petroleum use, EIA expects imports to rise from a 1987 level of 37 percent to between 44 and 56 percent of total supply in 1995 and between 46 and 60 percent in 2000. NHTSA notes, however, that future projections about petroleum imports are subject to great uncertainty. For example, the EIA's 1977 Annual Report to Congress projected that net oil imports by the U.S. would, in the "reference case", reach 11 MMB/D by 1985. Net imports in 1986 actually were 5.4 MMB/D, less than half the level predicted in 1977.

The level of oil imports remains an issue for the nation as a whole. In 1987, the U.S. imported $411.3 billion worth of goods and exported $257.6 billion, resulting in a deficit of $153.7 billion. To the extent that oil imports remain steady or decrease, instead of increasing, there is a positive effect on the nation's balance of trade problem.

In March 1987, the Department of Energy submitted a report to the President entitled "Energy Security". NHTSA believes that the following quotation from that report represents a useful summary of the current energy situation and national security:

> Although dependence on insecure oil supplies is * * * projected to grow, energy security depends in part on the ability of importing nations to respond to oil supply disruptions; and this is improving. The decontrol of oil prices in the United States, as well as similar moves in other countries, has made economies more adaptable to changing situations. Furthermore, the large strategic oil reserves that have been established in the United States (and to a lesser extent, in other major oil-importing nations) will make it possible to respond far more effectively to any future disruptions than has been the case in the past.
>
> The current world energy situation and the outlook for the future include both opportunities and risks. The oil price drop of 1986 showed how consumers can be helped by a more competitive oil market. If adequate supplies of oil and other energy resources continue to be available at reasonable prices, this will provide a boost to the world economy. At the same time, the projected increase in reliance on relatively few oil suppliers implies certain risks for the United States and the free world. These risks can be summarized as follows: If a small group of leading oil producers can dominate the world's energy markets, this could result in artificially high prices (or just sharp upward and downward price swings), which would necessitate difficult economic adjustments and cause hardships to all consumers.
>
> Revolutions, regional wars, or aggression from outside powers could disrupt a large volume of oil supplies from the Persian Gulf, inflicting severe damage on the economies of the United States and allied nations. Oil price increases precipitated by the 1978–79 Iranian revolution contributed to the largest economic recession since the 1930's. Similar or larger events in the future could have far-reaching economic, geopolitical, or even military implications.

B. Effect of Other Federal Standards

In determining the maximum feasible fuel economy level, the agency must take into consideration the potential effects of other Federal standards. The following section discusses other government regulations—both in process and recently completed—that may have an impact on fuel economy capability.

1. NHTSA Standards

Several relatively recent changes in Federal safety and damageability requirements could have an effect on CAFE. These include a May 1982 amendment to the Part 581 Bumper Standard reducing the standard's impact protection requirements and thereby permitting weight savings; an amendment to the agency's lighting standard, which permits greater aerodynamic efficiency; and implementation of automatic restraint requirements.

The bumper standard was amended for 1983 and later model years to provide for a 2½ mph impact test speed (compared to an earlier 5 mph impact test speed). The regulatory analysis accompanying this rule noted that manufacturers could realize a weight savings of from 15 to 33 pounds. This could produce a gain in fleet average CAFE capability of 0.2 mph to 0.5 mph. In the past, however, the agency has not factored in any CAFE advantage, because manufacturers have indicated that they continue to comply, on a voluntary basis, with the 5 mph standard. The agency endorses the voluntary use of 5 mph bumper systems.

The agency modified its Federal Motor Vehicle Safety Standard 108, Lamps, Reflective Devices, and Associated Equipment, to permit the use of replaceable light source headlamps, smaller sealed beam headlamps, and lower headlamp mounting height. The PRIA concludes that the ability to redesign headlamps in this way could result in a 2 to 3 percent improvement in aerodynamic drag. This in turn could produce a 0.4 to 0.9 percent improvement in fuel economy. For a 27.5 mpg fleet, this would equate to a 0.11 mpg to 0.25 mpg improvement in CAFE if all vehicles in that fleet employed the new lamp designs. Both Ford and GM are making extensive use of this new flexibility.

However, GM also notes in its August 1988 docket submission that composite headlamps have been partially responsible for its "C" and "H" carlines moving into a higher EPA test weight category, producing a negative CAFE effect. The agency seeks specific data concerning any negative impact manufacturers believe using this design flexibility has on CAFE levels.

A July 1984 amendment to Federal Motor Vehicle Safety Standard 208, Occupant Crash Protection, specified

the phase-in of automatic protection requirements beginning in model year 1987, with 40 percent phased in by MY 1989 and 100 percent implementation by MY 1990. The agency has developed its own estimate of the average incremental weight of automatic restraint systems. As noted in the PRIA, the agency's current best estimates of typical system incremental primary weights over manual belts are as follows: Front seat airbag, approximately 21 pounds; non-motorized automatic belts, approximately 11 pounds; and motorized automatic belts, approximately 15 pounds. Neither GM or Ford claimed during the Standard 208 rulemaking a specific weight penalty associated with these 208 requirements. Both stated, however, that there would be weight increases, and depending on the success or failure of weight-reducing efforts, as well as some weight-increasing pressures (options packages), that it is not unlikely that certain vehicles equipped with automatic restraints could result in the vehicle being placed in the next higher test weight class. This would have a negative effect on fuel economy. The agency seeks specific information from manufacturers to the extent the information demonstrates specific net weight effects of this standard.

On January 27, 1988, the agency published a proposed rule (53 FR 2239) to upgrade its test procedures and performance requirements for side impact protection for passenger cars. The agency is focusing on two ways of improving the side impact performance of passenger cars: Adding padding on the door and increased structure to reduce intrusion. Specific weight penalties are not known yet, and will depend on such factors as final performance requirements, chosen countermeasure, and baseline vehicle performance. The agency has not considered any negative effect of this proposed standard on CAFE performance, since any final rule on this subject would not apply to the model years under consideration in this rulemaking.

On June 16, 1987, the agency published an advance notice of proposed rulemaking (52 FR 22818) requesting comments on the possible requirement to install lap/shoulder belts in rear seating positions of passenger cars, multipurpose vehicles and small buses. The agency anticipates that any additional weight penalty for this requirement would be minimal, with the current estimate of 0.6 pounds for each outboard seat and 2.4 pounds for the center seat. The agency has not considered this weight penalty in its evaluation of fuel economy and notes that essentially all manufacturers indicate that they will achieve voluntary compliance with this requirement for all of their passenger cars by MY 1990.

2. EPA Noise Standards

The agency is not aware of any plans on the part of the Environmental Protection Agency to promulgate noise regulations during the time period under discussion. Accordingly, no fuel economy penalties from noise regulations have been forecast.

3. Emissions Standards

EPA has not announced any plans to modify its current exhaust emission control requirements for hydrocarbons, carbon monoxide and oxides of nitrogen. Therefore, the agency has not considered any further impacts on fuel economy from control of these pollutants. As discussed in the PRIA, the agency has analyzed previously the effects of the current requirements on fuel economy.

Also discussed in the PRIA is EPA's tightening control of particulate matter that became effective in MY 1987. While this requirement applies to all vehicles, the only current production powerplant which will have difficulty meeting this requirement is the diesel engine. EPA has indicated that there is a 1 to 2 percent fuel economy penalty for diesel powered vehicles which require a particulate trap to comply with the standard; however, the agency believes that only a very small fraction of the diesel vehicles (those with larger displacement engines) will need traps for compliance.

In July 1987 EPA issued a proposed rule on the on-board control of refueling emissions. The proposal would limit gasoline vapor emissions to 0.10 grams of vapor per gallon of dispensed fuel. The agency has not taken this future rulemaking into its estimates of CAFE levels for two reasons. First, the final rule, when issued, will not take effect until two model years after that point, which is beyond the model years that are the subject of this rulemaking. And second, the real weight impact is not clear. EPA estimates that this regulation would add about 4–5 pounds to a vehicle, which could reduce the average Ford or GM fleet CAFE by 0.04 mpg. There is additional concern that this requirement could affect compliance with the exhaust emissions requirements and degrade fuel economy. This may happen because canister purging may occur when the engine is least likely to be able to compensate for it. Ford also claims that the increase in test fuel volatility (RVP) will increase HC and CO emissions.

The California Air Resources Board (CARB) has adopted a new requirement which will require 50 percent of all MY 1989 light duty passenger cars and 90 percent of MY 1990 passenger cars to meet a 0.4 gm/mi NO_x standard. GM has indicated that this requirement will result in a 4 to 5 percent negative impact on the fuel economy of approximately 300,000 of its vehicles. Ford has not claimed specific CAFE losses due to the California NO_x requirements. Half of all vehicles certified to the Federal NO_x standard, are already below the California standard of 0.4 gm/mi level. While they may not be far enough below to ensure compliance, CARB believes that its standard can be met with little or no degradation in fuel economy using refined emission control technology calibrations and higher catalyst loadings. NHTSA does not see whatever small penalty there may be while manufacturers gain experience certifying at this new level, as significant or long-lasting.

4. EPA Test Procedure

The Environmental Protection Agency published a final rule on July 1, 1985, providing CAFE adjustments to compensate for the effects of past test procedure changes (See 50 FR 27172). The final rule adopted a formula approach for calculating CAFE adjustments. The manufacturer projections discussed above include the effect of the EPA test adjustment credit. Due to the formula approach, the specific value of the credit may vary for different model years and among manufacturers. A typical credit for the model years in question would be 0.2–0.3 mpg.

C. Industry Capability: Technological Feasibility and Economic Practicability

1. Manufacturer CAFE projections

In response to its questions published in the **Federal Register**, the agency received comments from 11 manufacturers, the Competitive Enterprise Institute, and one member of Congress. The agency submitted additional questions to six manufacturers, who responded in May of this year. GM and Ford both project falling short of the 27.5 mpg standard for MYs 1989–90, for their domestic fleets, although GM's April 1988 comments indicate that it will achieve 27.6 mpg in MY 1988. Chrysler indicates that it will achieve or exceed the 27.5 mpg CAFE level for MYs 1989–90, with projections of 27.6 mpg for MY 1989 and 27.9 mpg for

MY 1990. In addition, many importers (those which specialize in smaller vehicles) currently have fleets above the CAFE statutory standard of 27.5 mpg, including: Mazda, Subaru, Suzuki, Toyota, Volkswagen, Mitsubishi, Nissan, Isuzu, Yugo, Honda, and Hyundai. (This also is true of GM's and Ford's imported passenger fleets, which are required by the statute to meet the CAFE standard separately from their domestic fleets.)

Manufacturers indicating that they may not meet the CAFE standard of 27.5 mpg in MYs 1989 and 1990 include Ford and GM (domestic fleets) and several limited product-line manufacturers, including Volvo, Saab, Mercedes-Benz, Jaguar, Porsche, BMW, Austin Rover, and Peugeot. GM, Mercedes-Benz, and Austin Rover each submitted a petition to lower the standard. The remaining foreign manufacturers are all members of AIA, which also submitted a petition to lower the standard.

Since either Ford or GM alone would constitute a substantial share of the market, and both manufacturers project MYs 1989–90 CAFE levels below 27.5 mpg, the agency focused on their projections in its analysis of industry projections.

Ford provided in its April 12, 1988, submission an analysis of how its earlier projections of 27.6 mpg for MY 1989 and 27.7 mpg for MY 1990 projected on October 23, 1985, had declined to the present estimates of 26.6 mpg for both years. The principal reason for the decline is attributed to technical changes, primarily weight increases (due to occupant protection systems required by Standard 208; see discussion in previous section of this Preamble) and lower than expected fuel economy of several series. Ford has partially offset these losses, however, by implementing some small engine improvements and achieving weight reduction in other models. Sales mix shifts have resulted in a decrease in CAFE, as has decreased marketing efforts and delays in product introduction. Ford identifies several risks for its projections, and offsetting opportunities.

As indicated previously, GM characterizes its projected MY 1988 CAFE of 27.6 mpg as a surprise. While this performance can be seen as prima facie evidence that GM is making reasonable efforts to achieve 27.5 mpg, the achievement also raises the issue of why achieving 27.5 mpg is not feasible for MYs 1989 and 1990 as well. GM indicates that the unexpected MY 1988 CAFE level was the result of unanticipated fuel economy performance in EPA tests, which cannot be considered necessarily repeatable, and the extended model year for the Beretta and Corsica.

In fact, GM indicates that its CAFE level will drop over the next two years, from 27.6 mpg in MY 1988, to 27.1 mpg in MY 1989 and 26.9 mpg in MY 1990. GM identified several reasons for this drop in its projected CAFE, including continued growth in demand for larger cars and higher performance (ascribed to lower gasoline prices) and import competition with small cars.

In response to an additional request from the agency, GM submitted detailed variance analyses to explain GM's efforts in attaining the statutory CAFE compliance level. GM provided the agency with specific analyses for different mpg changes, model mix changes and engine mix changes. Examples of the types of changes which result in GM projecting a drop in its fleet's CAFE for MYs 1989–90 include the following:

GM projects a positive net CAFE change due to all model mix shifts between the 1988 and 1989 model years of 0.01 mpg. GM indicates that the largest effect in this category is due to the discontinuation of its "G" models. For MYs 1989–90, GM indicates a negative net CAFE change of 0.06 mpg due to model mix shifts, the details of which were submitted under a claim of confidentiality.

GM also provided details on changes in its CAFE projections based on engine mix shifts and mpg changes. GM describes changes to components and systems to improve the engine quality and reliability, and performance. Changes include technology updates to the fuel injection systems, the addition of newer, high technology engines, increased V–6 volume, and other changes in response to indications of consumer preference.

NHTSA is in the process of analyzing the manufacturers' MYs 1989–90 CAFE projections. Among other things, the agency is attempting to answer the following questions:

9. Both GM and Ford have exceeded a number of the MYs 1986–88 CAFE projections they provided to the agency during the rulemakings for those model years. For example, GM exceeded its MYs 1986–87 projections by 0.3 mpg and 0.4 mpg, respectively, and now expects to exceed its MY 1988 projection by 0.7 mpg. The agency requests information to help it understand why the manufacturers exceeded prior projections, and whether the same types of factors are likely to result in the current MYs 1989–90 projections being exceeded.

10. To what extent do the manufacturers' current MYs 1989–90 CAFE projections reflect the effects of the 1986 fall in gasoline prices? What evidence is available concerning whether that drop in gasoline prices affected consumer demand during MYs 1986–88? In answering this question, please address the fact, noted above, that actual CAFE levels for MYs 1986–88 in some cases exceeded manufacturer projections. Is the effect of the 1986 fall in gasoline prices on consumer demand likely to be the same in MYs 1989–90 as for previous model years? If not, why?

11. What effect is import competition likely to have on the domestic manufacturers' CAFE levels for MYs 1989–90, as compared to recent model years? To the extent that there may be increased penetration of small import cars, how would this affect GM's and Ford's domestic CAFE values? To the extent that import manufacturers are importing larger vehicles, how would this affect GM's and Ford's domestic CAFE values? In addressing these questions, please discuss which of GM's and Ford's domestic models, as opposed to import models, compete with small and large import cars.

While the agency has not completed its analysis of manufacturer projections, it believes that the maximum feasible CAFE for MYs 1989–90, without unreasonable risk to any manufacturer with a major share of the market, is at least 26.5 mpg.

2. Possible Additional Actions To Improve MYs 1989–90 CAFE

In the past, the agency's rulemaking record has included discussions of technological improvements to the engine and transmission, as well as weight reduction, and aerodynamic and rolling resistance reduction as the prime sources for fuel economy improvements. From the entire fleet perspective, technological changes have been impressive: Over the past 10 years, the average passenger car weight has declined by 800 pounds, the average engine displacement has dropped from 280 CID to 162 CID, front-wheel drive has increased from 7 percent to 75 percent of the new car fleet, automatic transmissions with overdrive and/or lock-up torque converter clutches have increased from less than 1 percent to 85 percent and fuel-injected engines have increased from 5 percent to 72 percent.

For MYs 1989–1990, as indicated in the rulemaking record of this and prior CAFE rulemaking proceedings, there are a number of fuel-efficiency enhancing methods that are not fully utilized throughout the GM and/or Ford fleets. These include further weight reduction; front-wheel drive; four-speed automatic

transmissions; engine improvements such as advanced electronic control of engines, reduced friction, and lean-burn fast-burn combustion; reduction of parasitic losses; and aerodynamic and rolling resistance reductions. All of these methods have previously been identified by the agency as feasible, and are partially utilized by the GM and Ford fleets, as well as by other manufacturers.

As a practical matter, it is not feasible for manufacturers at this point to implement significant technological changes for MY 1989 or MY 1990, due to lack of leadtime. This would not prevent the agency from maintaining the standard at 27.5 mpg, however, if it cannot make a determination of reasonable efforts, for the reasons discussed previously. The agency is analyzing whether additional, minor technological changes could be made during the 1989 model year or for MY 1990.

In considering whether further technological changes can be made for MYs 1989–90, NHTSA requests information or comments on the following questions:

12. What is the feasibility (bearing in mind both technological feasibility and economic practicability) of the various fuel-efficiency enhancing technologies, including but not limited to those identified in the agency's PRIA, for improving manufacturers' CAFE to or nearer to 27.5 mpg for MY 1989 and MY 1990? In answering the question, please address the potential penetrations of those technologies during this time period. If not feasible, why not? What are the leadtimes involved in making such technological changes?

13. To what extent, if any, would fuel economy improvements adversely affect consumer choice of vehicles or engines? If the record shows that it would adversely affect consumer choice, how should the agency take account of the effect of such restrictions in evaluating possible improvement of CAFE by additional technological means? Please address this issue with respect to the various available fuel-enhancing technologies, e.g., diesel engines, changing from rear-wheel drive to front-wheel drive, performance reductions, etc. and the legislative history indicating Congress' intent that consumer choice not be unduly limited. The agency seeks specific comment from the public on the trend toward increasing acceleration performance and whether manufacturers have any role in stimulating this trend through advertising or marketing strategies.

In previous rulemakings to lower the CAFE standard, the agency has evaluated the use of marketing efforts and/or product restrictions to improve CAFE. In the past, the agency has concluded that GM and Ford both have made efforts to promote the sales of fuel-efficient cars and determined that the manufacturers have undertaken extensive and significant marketing efforts to shift consumers toward their more fuel-efficient vehicles and options.

The agency also has stated previously that it believes that the ability to improve CAFE by additional marketing efforts is relatively small. As a practical matter, marketing efforts to improve CAFE are largely limited to techniques which either make fuel-efficient cars less expensive or less fuel-efficient cars more expensive. Moreover, the ability to increase sales of fuel-efficient cars largely relates to either increasing market share at the expense of competitors or pulling ahead a manufacturer's own sales from the future. A factor which makes it difficult for the domestic manufacturers to sell domestically-produced fuel-efficient cars is the growing competition of lower-priced small cars from newly developing countries such as Yugoslavia and South Korea.

Another consideration in this area is that the manufacturers' success in improving the fuel-efficiency of large cars has itself made it more difficult to sell smaller cars. The reason for this is that there are diminishing returns in terms of greater fuel economy from purchasing small cars as the fuel efficiency or larger cars increases. Similarly, as gasoline prices have declined, there are diminishing returns to the consumer from purchasing more fuel-efficient vehicles.

There is a problem with pulling ahead sales, as mentioned above, which consists of the manufacturer's CAFE for subsequent years being reduced. For example, if a manufacturer increases its MY 1988 CAFE by pulling ahead sales of fuel-efficient cars from MY 1989, the MY 1989 CAFE will decrease, compared with the level it would have been in the absence of any pull-ahead sales attributable to marketing efforts. For this reason, a manufacturer cannot continually improve its CAFE simply by pulling ahead sales.

The agency is not sure that manufacturers can improve significantly their CAFEs by increased marketing efforts. In a follow-up question to six manufacturers, the agency asked for details of specific marketing efforts undertaken during MYs 1987–88 to encourage the sale of more fuel efficient cars or engine options. NHTSA also asked for the financial and CAFE effects of these activities. Of the manufacturers asked, only one (Volvo) indicated that it did not spend its marketing money on promoting sales of its more fuel-efficient models. Volvo indicated that since its two carlines achieve similar CAFE, it is not an appropriate use of marketing funds. Volvo did indicate, however, that it provides some pricing incentives to encourage the sale of its more fuel-efficient vehicles (those with manual transmissions).

Ford and GM both presented specific information concerning their marketing programs. GM indicates that its total cost for numerous incentive programs for its fuel-efficient cars during MYs 1987–88 was over $2.0 billion. Ford indicates that its expenditures for its marketing program approaches $3.0 billion for the years 1982–1988. Ford also stated that its marketing support costs are disproportionately greater for its fuel-efficient models than its large-luxury models.

In considering whether marketing efforts can be used to improve CAFE beyond the levels projected by the manufacturers, NHTSA requests comments on the following questions:

14. Please quantify any financial or CAFE effects of marketing programs undertaken during MYs 1987–88 to encourage the sale of more fuel-efficient cars or engine options. (Describe the specific marketing programs undertaken.) What relevance, if any, does the MY 1987–88 experience have to what can be done for MYs 1989–90?

In looking at the potential methods for improving CAFE, the agency also has recognized in the past that manufacturers could improve their CAFE by restricting their product offerings, e.g., deleting less fuel-efficient car lines or dropping higher performance engines. However, the agency also acknowledges that, to the extent these product restrictions result in net sales losses, they could have a significant adverse economic impact on the industry and the economy as a whole, and could run counter to the statutory criterion of economic practicability and the Congressional intent that the CAFE program not unduly limit consumer choice.

VIII. Determining Maximum Feasible

As discussed above, section 502(a)(4) provides that the 27.5 mpg standard can be amended if the agency determines that some other standard represents the maximum feasible average fuel economy level. Such an amendment will be made only if the agency first makes a determination that the manufacturers made reasonable efforts to meet the standard. If the manufacturers'

compliance plans were overtaken by unforeseen events, this determination includes consideration of the efforts made by manufacturers to offset the effects of those events. In determining maximum feasible, the agency considers the four factors of section 502(e): Technological feasibility, economic practicability, the effect of other Federal motor vehicle standards on fuel economy, and the need of the nation to conserve energy. Also, as discussed above, the agency takes industrywide considerations into account in determining the maximum feasible average fuel economy level.

A. Interpretation of Feasible

Based on dictionary definitions and judicial interpretations of similar language in other statutes, the agency traditionally has interpreted "feasible" to refer to whether something is capable of being done, taking into account the four statutory criteria mentioned above. The statute does not elevate any one of these criteria above the others, nor does it provide guidance to the agency in weighing any of these criteria more heavily than any others. For example, the agency's determination of the "maximum feasible" standard cannot be that level which is merely the maximum technologically feasible without regard to the economic practicability of such a level.

B. Economic Impacts of Not Amending the 27.5 mpg Standard

As the agency has stated in previous rulemakings, the determination of a maximum feasible level is not a cut and dry mathematical formula, but rather, a series of decisions based on interrelated trends, projections and factors. The agency's analysis of economic impacts is based on a preliminary assessment of GM's and Ford's capabilities, and is discussed in the PRIA.

In the past, the record of the rulemakings has shown that a CAFE standard set above those companies' capabilities could have an adverse effect on production, and hence employment, for either or both companies. For example, in the MY 1986 rulemaking, GM stated that it "must contemplate the possibility of restricting the production of many of [its] more popular models" (GM statement of August 8, 1985, public hearing). Similarly, in the MYs 1987–88 rulemaking, GM claimed that in order to remain in compliance, it "would have to both curtail drastically production of its fuel efficient cars and attempt to increase greatly its small car sales * * * [N]et GM production cuts could be more than 1 million cars" (GM submission of March 24, 1986).

While GM indicated in previous years that it "*must* contemplate" product restrictions (emphasis added) and "*would* have to curtail * * * production" (emphasis added), its statements in this rulemaking to date are less clear on this issue. For example, in its April 11, 1988, submission, GM only claimed that it "*may* need to restrict production" (emphasis added), and in its August 10, 1988, submittal GM stated that "product restrictions provide one means of assuring compliance." At the same time, that submission discussed other, technological means of complying with a 27.5 mpg standard. In summarizing its CAFE compliance planning, GM stated that with projections beneath 27.5 mpg, meeting the standard in a given year depends on "*either*" (a) product restrictions, with concomitant job losses to GM and its suppliers of 60,000 for MY 1989 and 110,000 in MY 1990 (with higher job loss estimates if minimum uncertainties are considered), "*or*" (b) recovery actions involving significant costs and marketing risks. (Emphasis added.) That company also stated that the latter approach *could* produce job impacts as a consequence of lower sales. (Emphasis added.) NHTSA believes that it is unclear from GM's submission the extent to which it believes jobs are at issue. This notice should not be viewed as an agency conclusion that the employment loss figures cited by GM, or any other employment losses, are likely. The agency will continue to analyze this issue during the comment period.

Ford indicates that it intends to comply with the statutory CAFE level of 27.5 mpg for MYs 1989–90 through the use of credits earned for exceeding the standard in other model years. Ford notes, however, that if sufficient credits are not available in the specified time period, there would be a significant increase in its compliance costs. The lack of lead-time as well as the lack of identifiable technology would force Ford to implement a more aggressive forced sales mix restrictions.

In analyzing possible employment impacts, NHTSA believes that it is obvious that some product decisions to restrict options might have a limiting effect on consumer choice, but would not necessarily have an adverse net employment effect. While the agency would need to consider whether product decisions to limit options would unduly limit consumer choice, the agency also believes it is important to keep separate in its analysis those product restrictions that would have adverse U.S. employment effects and those that might not. The agency also notes a trend in the industry (presumably unrelated to CAFE) to limit the number of consumer options on some models, generally by making previous options standard or only offering options in packages, in order to enchance competitiveness by introducing efficiencies and streamlining production. These decisions are described in business journals as related to efforts to increase market share which, if successful, should have a positive effect on U.S. employment. NHTSA requests commenters that address product restrictions to indicate whether the restrictions being discussed necessarily have an associated employment effect, and why.

As the agency analyzes possible employment impacts, it is attempting, among other things, to answer the following questions:

15. To what extent, if any, are U.S. jobs affected by the level of the MY 1989–90 CAFE standards and thus at issue in this rulemaking? If restricting products (with concomitant job losses) is one of a number of compliance options available to a manufacturer, how should the agency consider that option as compared to other options? To what extent would potential compliance actions other than restricting products (including "recovery" actions) affect jobs? Would such actions affect the competitiveness of the domestic industry? If so, would this have a negative impact on jobs? Would some potential compliance actions, such as marketing efforts to sell a greater number of U.S.-made smaller, more fuel-efficient cars, have a positive impact on U.S. jobs?

16. As discussed in connection with analyzing manufacturer CAFE projections, both GM and Ford have exceeded a number of the MYs 1986–88 CAFE projections they provided to the agency during the rulemakings for those model years. During those rulemakings, the manufacturers also provided estimates of job losses that would result from exceeding their projections. The agency requests information to help it understand how the manufacturers exceeded prior projections without apparent job losses, and whether the same types of factors are relevant to MYs 1989–90.

The agency also looks at the effect on gasoline consumption of a different CAFE standard. The per-vehicle present discounted value of lifetime fuel costs for a MY 1989 passenger automobile with a fuel economy level of 27.5 mpg is $3,237. If this same car achieved a fuel economy level of 27.0 mpg, it would add

$60 to the lifetime operating cost of the vehicle. If this same car achieved a fuel economy level of 26.5 mpg, an additional $62 would be added to the total operating cost of the vehicle. The financial significance to the consumer of these incremental changes in fuel economy has declined since the early 1970's as the fuel efficiency already achieved by the overall vehicle fleet has increased dramatically.

The precise magnitude of possible energy savings associated with retaining the 27.5 mpg standard versus establishing a lower standard is uncertain. The maximum hypothetical difference in gasoline consumption between GM and Ford achieving 26.5 mpg in MY 1989–90, as compared to those companies achieving 27.5 mpg, would be 1.8 billion gallons of gasoline over the life of the MYs 1989–90 fleets. This would represent a maximum yearly impact on U.S. gasoline consumption of 238 million gallons, or roughly 0.3 percent of total annual automobile consumption. In terms of U.S. petroleum consumption, it would amount to a maximum yearly increase of 0.09 percent.

The actual energy savings could be less if certain manufacturers were able to meet the 27.5 mpg standard only by restricting sales of their larger cars. In that event, consumers desiring such vehicles might tend to keep their older, larger cars in service longer, which generally are less fuel-efficient than their new counterparts; or they might purchase similar vehicles from manufacturers which did not face CAFE constraints; or they could purchase larger pick-up trucks and vans (which are less fuel-efficient, but not subject to the passenger automobile CAFE standards) to obtain the room, power and load-carrying capacity they desire. Those actions would have adverse (or at least neutral) effects on actual fuel consumption, which could offset in whole or part the theoretical energy savings associated with a higher passenger vehicle CAFE standard.

C. Consideration of Standards Above GM's and/or Ford's Capability

In the MY 1987–88 rulemaking, NHTSA considered, as part of taking industrywide considerations into account, whether a standard could or should be set at levels above the capabilities of GM and/or Ford. The agency concluded that since GM then produced more than 40 percent, and Ford approximately 18 percent, of all cars sold in the U.S., CAFE standards set at the level of the least capable of these manufacturers represents an appropriate balancing of "the benefits to the nation of a higher average fuel economy standard against the difficulties of individual manufacturers." NHTSA also stated that given GM's and Ford's large market shares, it believed that a standard set at a level above either company's capability would be inconsistent with taking industrywide considerations into account.

The MYs 1987–88 decision was made in the context of a determination that both GM and Ford had made reasonable efforts to achieve 27.5 mpg CAFE for those two model years. As discussed above, NHTSA is still in the process of analyzing whether it can make such a determination for GM and Ford for MYs 1989–90. There is thus a possibility that the agency will conclude that one manufacturer made reasonable efforts to achieve 27.5 mpg and that the other did not. Should this occur, it is also possible that an approach of not setting a standard at a level above either company's capability could result in the company which did *not* make reasonable efforts driving the level of the standard downward.

As discussed above, the agency has previously concluded that reducing a standard notwithstanding the absence of reasonable efforts by the industry would be an abuse of discretion. Moreover, the Court of Appeals has stated that lowering the standard whenever the larger manufacturers assert current inability to meet the standard would, without doubt, completely vitiate the statutory scheme. NHTSA's approach of analyzing reasonable efforts for purposes of deciding whether to exercise its discretion to amend a standard and then following its traditional approach of analyzing maximum feasibility as of the time of the amendment for purposes of setting the new standard produces results clearly consistent with the statutory scheme so long as either all, or none, of the larger manufacturers have made reasonable efforts to achieve 27.5 mpg CAFE for a particular model year. NHTSA notes, however, about the possible result where the capability and reasonable efforts of one of the larger manufacturers "opens the door" for setting a new standard, and the lower capability of another larger manufacturer which has not made reasonable efforts drives the level of the standard downward. The agency requests comments on the following question:

17. If the capability and reasonable efforts of one of the larger manufacturers justifies an amendment to lower the 27.5 mpg standard, and another larger manufacturer which may not have made reasonable efforts to achieve 27.5 mpg CAFE for the model year in question (whether because it decided to utilize the statute's flexibility related to credits or for any other reason) has a lower capability which could drive the level of the standard downward, how should the agency consider this issue in setting the new standard at the "maximum feasible average fuel economy level"?

IX CEI Petition

CEI's petition requested, based on safety considerations, that NHTSA set the MY 1989–90 standards at a "nonconstraining" level, i.e., a level at or below the CAFE that manufacturers would achieve in the absence of any regulatory program. The petitioner argued that larger cars are generally more crashworthy than smaller cars, and that downsizing is a major means by which carmakers improve the fuel economy of their product. CEI argued that to the extent that a particular model year's CAFE standard mandates a level of fuel economy above that which would otherwise be achieved, it diminishes the crashworthiness of the new car fleet. The petitioner cited a report by Robert W. Crandall of the Brookings Institution and John D. Graham of the Harvard School of Public Health in support of its contention.

NHTSA believes that setting CAFE standards deliberately low enough to be "nonconstraining," as requested by CEI, would be inconsistent with EPCA's requirements and thus outside the agency's legal authority. As discussed above, in 1975, Congress set the 27.5 mpg standard for MY 1985 and subsequent years by statute. The 27.5 mpg standard represented a long-term goal, requiring manufacturers to essentially double their CAFE. While the Act provides NHTSA with authority to amend the standard for particular model years, any amended standard must be at the "maximum feasible" level. Clearly, Congress intended the CAFE program to have a substantial impact on the cars being produced.

While NHTSA shares CEI's objection to the CAFE program (albeit for different reasons), the agency cannot unilaterally alter or ignore the statute. As noted earlier, NHTSA has asked Congress to repeal the law; but until then, we must administer it as written, despite our policy views. Any methodology of setting standards deliberately to be at or below the level that would be achieved in the absence of the CAFE program, whether for safety considerations or any other reason, would violate the requirement for maximum feasible

standards and vitiate the statutory scheme.

On the other hand, NHTSA believes that it is appropriate to consider safety in deciding whether to exercise its discretion to amend CAFE standards and also in determining maximum feasible fuel economy. NHTSA notes that in proceeding to the final step in its selection of the level of the MY 1981–84 passenger car CAFE standards, it dropped from further consideration the highest schedule of standards, i.e., the one based on the use of diesels, mix shifts and certain other actions. The agency did so in part because it desired further information on health effects of diesel particulates. 42 FR 33454–45.

NHTSA also notes that it has been argued that some recent product decisions that tend to *lower* CAFE may have adverse safety impacts. These observers have cited such things as recent significant increases in acceleration and performance of certain vehicles. In analyzing possible safety impacts, the agency must, of course, consider possible impacts in both directions.

In analyzing this issue, the agency requests information or comments on the following question:

18. Would lower passenger car CAFE standards for MYs 1989–90 have any impact, positive or negative, on safety? Why? The agency is particularly interested in comments from manufacturers as to whether and how they would change their product plans in response to a lower standard, i.e., whether weight would be added, whether additional safety features would be added and, if so, for which models; the quantitative impact such features would have on safety; and why the 27.5 mpg standard prevents or discourages them from offering such features. Are there product decisions that are adverse to safety that would be encouraged by a lower standard?

X. Comment Period

NHTSA is providing different comment periods for the proposed MY 1989 and MY 1990 standards. An abbreviated comment period is provided for the proposed MY 1989 standard, while a 60 day period is provided for the proposed MY 1990 standard.

The comment period is shortened for MY 1989, due the limited remaining time for amending that standard. NHTSA notes, however, that on March 16, 1988, it published a request for comments relating to one of the petitions requesting a reduction in the MY 1989–90 CAFE standards. That notice specifically sought information concerning manufacturer efforts at meeting the CAFE standards, manufacturer product plans, and projected CAFE levels. Thus, the public has had a previous opportunity to submit comments relating to a possible reduction in the MY 1989 CAFE standard, and has been aware for many months of the possibility of rulemaking in this area.

NHTSA also recognizes, however, that there may be some persons or organizations commenting for the first time. We encourage every interested person to comment, whether or not the submitter responds to all of the questions posed. The agency requests that the commenter identify the numbered question he or she is addressing. Each comment will be reviewed and considered by the agency.

NHTSA has stated previously that amendments reducing a standard for a particular model year may be made until the beginning of the model year, but not after that time. See 49 FR 41250, 41254–6 (October 22, 1984). While the agency has not established a particular date as the beginning of the model year, it has stated that the model year begins in the fall of the preceding calendar year. Moreover, in *In Re Center for Auto Safety*, 793 F.2d 1346 (D.C. Cir. 1986), the Court of Appeals stated that "the model year is traditionally thought to start approximately October 1st." That court also concluded that in amending the MY 1985 light truck CAFE standards on October 16, 1984, the agency failed to amend the standards before the start of that model year. In light of this decision, NHTSA believes that in order to be timely, any decision regarding the MY 1989 standard should be made and issued by the beginning of the model year, ordinarily thought to be the beginning of October.

EPCA does not establish a specific minimum notice period. Accordingly, NHTSA has established a reasonable comment period, based on the circumstances. The agency believes that the comment period for MY 1989 is sufficiently long to provide a full opportunity for meaningful participation by the public, and that a longer period would make it difficult or impossible to make a final decision in a timely manner. Accordingly, the agency finds good cause for the shortened comment period.

XI. Public Meeting

A public meeting will be held on September 14, 1988, in Washington, DC, at 9:00 a.m. at the U.S. Department of Commerce Auditorium, 14th Street and Constitution Ave., NW., Washington, DC 20591. The agency invites interested members of the public to participate in this meeting and to comment on the full range of issues raised by this proposal, and specifically to respond to the question of whether manufacturers have made reasonable efforts to meet the 27.5 mpg CAFE standard and to the question of the maximum feasible level for MY 1989 and MY 1990.

No opportunity will be afforded the public to directly question participants in the meetings. However, the public may submit written questions to the panel of Federal officials for the panel to consider asking of particular participants. The presiding officials reserve the right to ask questions of all persons making oral presentations.

Persons wishing to make oral presentations at the public hearing should contact Mr. James Jones, Office of Market Incentives, NHTSA, 400 Seventh Street SW., Washington, DC 20590, (202) 366–4793, by September 9, 1988, so that time limitations (if necessary) and the need for any special equipment, such as projectors, can be discussed and final arrangements can be made. Persons whose presentations will include slides, motion pictures, or other visual aids should submit copies of them for the record at the meeting. Oral presentations will be limited to between 5 and 15 minutes, depending on the number of witnesses. If the number of requests for oral presentation exceeds the available time, the agency may ask prospective witnesses having similar views or belonging to similar types of groups or occupations to combine their presentations.

Persons making oral presentations are requested, but not required, to submit 25 written copies of the full text of their presentation to Mr. James Jones no later than the day before the hearing. If time permits, persons who have not requested time, but would like to make a statement, will be afforded an opportunity to do so at the end of the day's schedule. Copies of all written statements will be placed in the docket for this notice. A verbatim transcript of the public hearing will be prepared and also placed in the NHTSA docket as soon as possible after the hearing. A schedule of the persons making oral presentations at the hearing will be available at the designated meeting area at the beginning of the public hearing.

XII. Written Comments

Comments are requested in three specific areas: reasonable efforts, jobs, maximum feasible capability, and safety effects of the CAFE program. The agency has discussed in more detail what it needs in each of the preamble sections dealing with these issues.

Interested persons are invited to submit comments on the proposal, regardless of whether they also present oral statements at the September 14 public meeting. It is requested but not required that 10 copies be submitted.

All comments must be limited not to exceed 15 pages in length (49 CFR 553.21). Necessary attachments may be appended to these submissions without regard to the 15-page limit. This limitation is intended to encourage commenters to detail their primary arguments in a concise fashion.

If a commenter wishes to submit certain information under a claim of confidentiality, three copies of the complete submission, including purportedly confidential information, should be submitted to the Chief Counsel, NHTSA, at the street address given above, and seven copies from which the purportedly confidential information has been deleted should be submitted to the Docket Section. A request for confidentiality should be accompanied by a cover letter setting further the information specified in the agency's confidential business information regulation (49 CFR Part 512).

All comments received before the close of business on the comment closing date indicated in the **DATES:** section of this preamble will be considered, and will be available for examination in the docket at the above address both before and after that date. Because of the short time available to decide whether to issue a final decision for MY 1989, the agency does not expect to be able to consider any late comments. For MY 1990, comments filed after the closing date will be considered to the extent possible. Rulemaking action may proceed at any time after the comment due date. Any comments received after the closing date and too late for consideration in regard to the action will be treated as suggestions for future rulemaking. The NHTSA will continue to file relevant material as it becomes available in the docket after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Those persons desiring to be notified upon receipt of their comments in the rules docket should enclose, in the envelope with their comments, a self-addressed stamped postcard. Upon receiving the comments, the docket supervisor will return the postcard by mail.

XIII. Impact Analyses

A. Economic Impacts

The agency considered the economic implications of the proposed amendment and determined that the proposal is major within the meaning of Executive Order 12291 and significant within the meaning of the Department's regulatory procedures. The agency's detailed analysis of the economic effects is set forth in a Preliminary Regulatory Impact Analysis, copies of which are available from the Docket Section. The contents of that analysis are generally described above.

B. Environment Impacts

The agency has analyzed the environmental impacts of the proposed amendment to the 1989–1990 model year passenger automobile average fuel economy standards in accordance with the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* Copies of the Environmental Assessment (EA) are available from the Docket Section. The agency has tentatively concluded that no significant environmental impact would result from the execution of this rulemaking action. The agency notes, for the first time in this EA, however, that part of its analysis should include the possible effects of the potential increase in carbon dioxide (CO_2) build-up as the result of action lowering the standard (build-up is known as the "greenhouse" effect).

C. Impacts on Small Entities

Consistent with the provisions of the Regulatory Flexibility Act, the agency has considered the impacts this rulemaking would have on small entities. I certify that this action would not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required for this action. No passenger car manufacturer, if subject to the proposed, rule would be classified as a "small business" under the Regulatory Flexibility Act. In the case of small businesses, small organizations, and small governmental units which purchase passenger cars, adoption of the proposed rule would not affect the availability of fuel efficient passenger cars or have a significant effect on the overall cost of purchasing and operating passenger cars.

D. Impact on Federalism

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

E. Department of Energy Review

In accordance with section 502(i) of the Cost Savings Act, the agency submitted this proposal to the Department of Energy for review. There were no unaccommodated comments.

List of Subjects in 49 CFR Part 531

Energy conservation, Fuel economy, Gasoline, Imports, Motor vehicles.

In consideration of the foregoing, 49 CFR Part 531 would be amended as follows:

PART 531—PASSENGER AUTOMOBILE AVERAGE FUEL ECONOMY STANDARDS

1. The authority citation for Part 531 would continue to read as follows:

Authority: 15 U.S.C. 2002, delegation of authority at 49 CFR 1.50.

§ 531.5 [Amended]

2. The table in § 531.5(a) would be amended by revising the fuel economy standards specified for MY 1989–90 to the levels determined by the agency to be the maximum feasible average fuel economy level, based on the considerations discussed above.

Issued: August 25, 1988.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 88-19699 Filed 8-26-88; 8:45 am]

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